

**TRANSCRIPT OF RECORD.**

---

---

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1917.**

**No. 734.**

---

**THE LOCOMOBILE COMPANY OF AMERICA, PLAINTIFF IN  
ERROR,**

**vs.**

**THE COMMONWEALTH OF MASSACHUSETTS.**

---

**IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF  
MASSACHUSETTS.**

---

---

**FILED OCTOBER 6, 1917.**

**(26,201)**



(26,201)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 734.

THE LOCOMOBILE COMPANY OF AMERICA, PLAINTIFF  
IN ERROR,

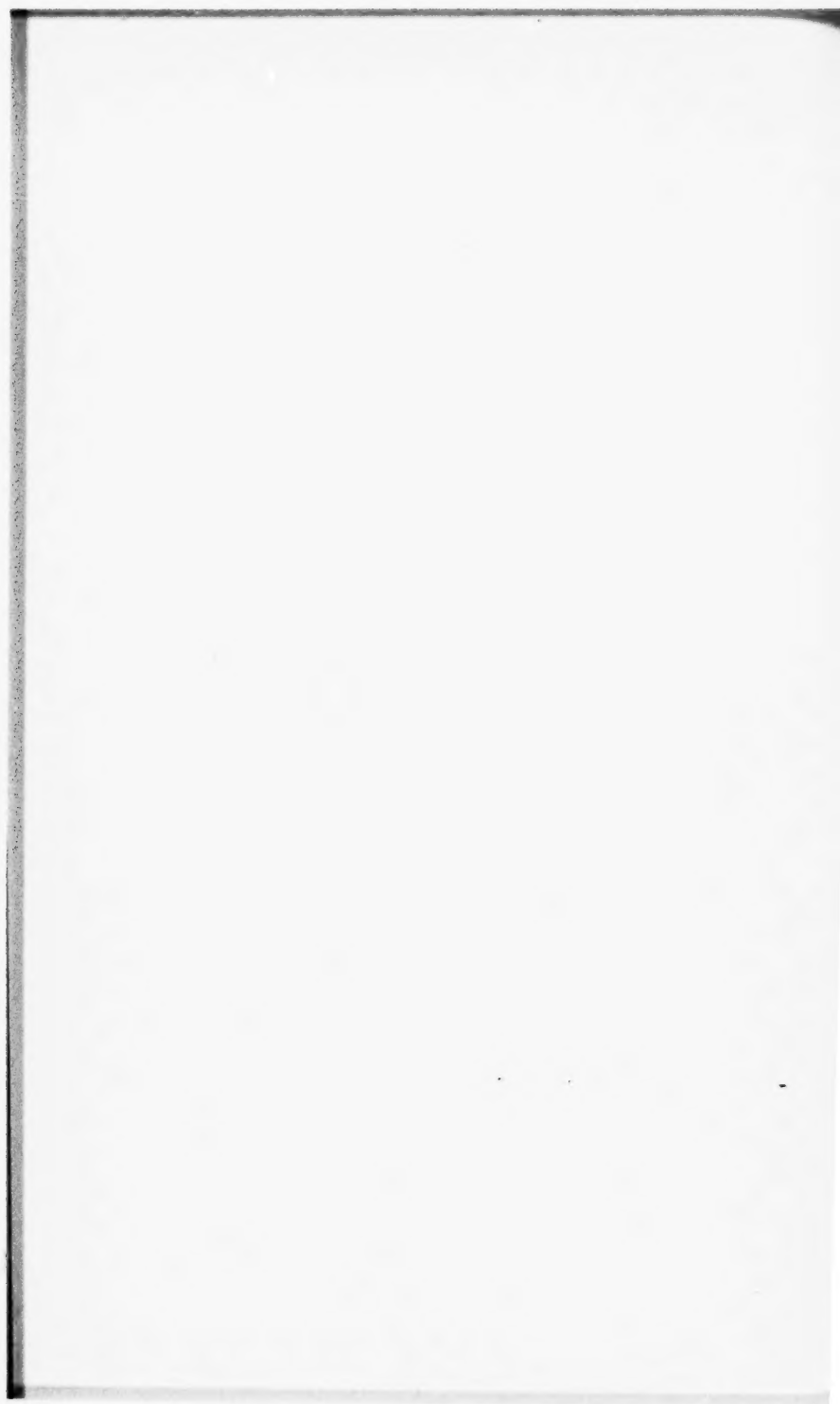
VS.

THE COMMONWEALTH OF MASSACHUSETTS,

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF  
MASSACHUSETTS.

INDEX.

	Original.	Print
Certificate of Chief Justice.....	<i>u</i>	1
Writ of error and return.....	1	1
Petitioner's bill of exceptions.....	1	3
Agreed statement of facts.....	1	3
Order blank.....	6	5
Petitioner's requested rulings of law.....	9	7
Judge's signature to bill of exceptions.....	12	10
Rescript.....	14	10
Final decree.....	16	11
Clerk's certificate.....	17	11
Reporter's certificate to opinion of Supreme Judicial Court....	18	11
Opinion, Rugg, C. J.....	19	11
Petition for a writ of error.....	23	13
Order allowing writ of error.....	25	13
Assignment of errors.....	26	14
Bond on writ of error.....	31	16
Citation and service.....	33	18
Stipulation as to record.....	35	19
Certificate of lodgment.....	36	19
Clerk's certificate to record.....	37	19



*a* COMMONWEALTH OF MASSACHUSETTS:

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this first day of October in the year one thousand nine hundred and seventeen.

[SEAL.]

ARTHUR P. RUGG,

I UNITED STATES OF AMERICA, ss:

[Seal of the District Court, Massachusetts.]

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, Holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The Locomobile Company of America, Petitioner, and Commonwealth of Massachusetts, Respondent, in a plea of Petition in Equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege,

or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Petitioner as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 28th day of September in the year of our Lord one thousand nine hundred and seventeen.

JAMES S. ALLEN,

*Clerk of the District Court of the  
United States, District of Massachusetts.*

September 28, 1917.

Allowed by

ARTHUR P. RUGG,

*Chief Justice of the Supreme Judicial Court  
of the Commonwealth of Massachusetts.*

[Endorsed:] 24624, Eq. The Locomobile Co. v. Comlth. of Mass. Writ of Error. Suffolk, ss. Supreme Judicial Court. Filed Sept. 28, 1917. John F. Cronin, Clerk.

2 COMMONWEALTH OF MASSACHUSETTS.

*Suffolk, ss:*

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I John F. Cronin, Clerk of said Supreme Judicial Court have hereto set my hand and the seal of said Court this first day of October A. D. 1917.

[SEAL.]

JOHN F. CRONIN, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS,  
Suffolk. ss:

To all persons to whom these presents shall come, Greeting;

Know ye, that among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of cases in Equity from the first day of January in the year of our Lord one thousand nine hundred and fifteen to the first day of October in the year one thousand nine hundred and seventeen, both days inclusive, it is thus contained: the following being the Petitioner's Bill of Exceptions, Rescripts and Final Decree in the case:

COMMONWEALTH OF MASSACHUSETTS,  
Suffolk County:

Supreme Judicial Court.

In Equity,

THE LOCOMOBILE COMPANY OF AMERICA

7.

COMMONWEALTH OF MASSACHUSETTS.

*Petitioner's Bill of Exceptions.*

This case came on for trial on the following agreed facts.

It is hereby agreed by and between the petitioner and the respondent in the above-entitled cause that, for the purposes of this cause, the following facts shall be taken as true and that the parties shall be entitled at any hearing thereon to refer to any of the statutes of this Commonwealth and any decisions of the Massachusetts or Federal Courts.

The pleadings are not regarded by the parties as material to the determination of the questions presented, but may be referred to, if material.

This cause is a petition in equity brought under section 70 of part III of chapter 490 of the Acts of 1909 and chapter 724 of the Acts of 1914 for the recovery of excise tax paid by the petitioners as foreign corporations alleged to have an usual place of business in this Commonwealth.

The petitioner is a foreign corporation duly admitted to do business in this Commonwealth prior to the passage of the foreign corporation laws of this Commonwealth contained in the Acts of 1903, chapter 437, sections 75 and 56 to 60, and since its admission has lawfully continued to do business within the Commonwealth and has fully complied with the requirements of the foreign corporation laws of this State.

No business of any kind, whether local or interstate, is carried on in Massachusetts by the petitioner except as stated herein.

5 The petitioner filed its annual certificate of condition under the provisions of section 54 of part III of said chapter 490 at the time when they paid the taxes in question.

The petitioner is a corporation with an authorized capital stock of \$6,500,000 incorporated under the laws of West Virginia.

It is lawfully authorized by its charter to sell automobiles, the purpose for which it is incorporated being set forth in its charter as follows.

"Purchasing, leasing or otherwise acquiring lands and buildings for the erection and establishment of a manufactory or manufactories and workshops with suitable plants, engines and machinery with a view to manufacture, purchase, sell or otherwise deal in automobiles, autotrucks, horseless carriages, trucks and vehicles of every kind and description, and to manufacture, purchase or otherwise acquire, hold, own, mortgage, pledge, sell, assign and transfer, or otherwise dispose of, to invest, trade, deal in and deal with goods, wares, merchandise and property of every class and description; to purchase or otherwise acquire patent rights and privileges, improved or secret processes for or in any way relating to all or any of the objects aforesaid; to grant licenses for the use of or the sale or otherwise deal with any patents, patent rights, privileges, improved or secret processes, acquired by the Company; to sell, lease or otherwise deal with real or personal property of the Company, and to carry on any other business which may seem to the Company capable of being conveniently carried on in connection with the above or calculated directly or indirectly to enhance the value of the Company's property or rights."

It seeks to recover a tax of \$1,300 being a sum equal to 1/50 of 1 per cent of its authorized capital stock.

Its factory is located in Bridgeport, Conn., where it is engaged in the business of manufacturing and selling automobiles. It occupies in Boston, under lease, as an office, salesroom and repair shop for the purpose of repairing its own make of cars and second-hand cars taken in exchange for its own make, a three story building, 150 by 150 feet. There is a local manager and sales force.

The employees number thirty, ten of them being in the sales and office force and twenty in the repair department. Its business at this office is conducted as follows: Orders are taken in the local

6 office for automobiles. The order, signed by the purchaser, is sent to the home office in Bridgeport, Conn., for approval.

The order of the customer is taken subject to the approval of the home office of the company in Bridgeport, Conn. At the time of signing the order the purchaser makes an initial payment of 10 per cent of the purchase price in one third of the cases, paying the balance at the time of delivery of the car. In one third of the cases the purchaser pays the entire consideration at the time of delivery of the car. In the remaining third of the cases the company accepts, as a part of the consideration, a car, of whatever make, previously used by the purchaser, and the balance of the consideration is paid in cash by the purchaser at the time of the delivery. The written order, signed by the purchaser, is sent by the Boston

representative of the company to the company's home office at Bridgeport, Conn., for approval, and, if approved, the company then notifies its representative to that effect. The usual course of business is for the purchaser to sign an order filed in on a printed blank, which reads as follows:

"Car Order.

Customers' Cars are Driven by Our Staff Only at Customers' Risk and Responsibility.

All Contracts and Sales are Made Without Liability on our Part For Delay, Arising From Strikes, Accidents or Other Causes Beyond Our Control.

The Locomobile Company of America.

Executive Offices: Bridgeport, Conn.

— — — — —, 191—.

To the Locomobile Co. of America, of Bridgeport, Conn.:

You are hereby authorized to enter — order on your books for one Locomobile Type —, as per specifications given below, and for which — agree to pay the sum of — Dollars same to be delivered f. o. b. Bridgeport, Conn.

Terms: — Dollars payable on signing this order; balance — Dollars payable upon notification that the Locomobile is ready for delivery.

In the event of the failure or refusal of the purchaser promptly to carry out this contract and pay the balance due thereon, the cash payment may at the option of the seller be retained by it as liquidated damages.

Purchaser ———.

Address ———.

Shipping Date on or about ———.

Via ———.

Monogram ———.

Body Striping ———.

Style of Body ———.

Body Color ———.

Color of Upholstery ———.

Chassis Color ———.

Tires ———.

Mouldings ———.

Chassis Striping ———.

For Regular Equipment, See Catalogue

## Extras at Extra Cost.

Glass Wind Shield.

Seat Covers.

Baggage Rack.

Speedometer Odom. (Comb).

Shock Absorbers.

Remarks ———.

Clock.

Special Horn.

Searchlight.

Order taken by ———.

(Signed)

—————, Purchaser.

N. B.—In filling out the above Specifications please be careful to specify exactly what is required, as after this order has been entered it is impossible to make any changes without delaying delivery of car.

Form 81B-2M-3-11-13.

[In Margin:] It is agreed that this written order expresses the entire contract; and further that no alteration or addition thereto shall be of any force or effect whatever unless the same be made in writing."

This order is also signed after the words "order taken by" by the salesman, and is forwarded by the local branch of the company in Boston to the home office.

The office in Massachusetts is in charge of a local manager, who, in making sales and deliveries, acts as the agent of the company, and is paid a salary by it.

All deliveries of new machines made by the Company are delivered from the company's factory in Connecticut, as follows: The machine is delivered from the company's factory in Bridgeport to the railroad company in Bridgeport, consigned to the company in Boston. The company, through its Boston agent, receives it from the railroad cars in Boston, takes it to its Boston place of business, and from there, upon final payment including freight charges from Bridgeport, being made, delivers it to a purchaser who has ordered such a car and has signed one of the orders above stated.

All such deliveries are made by the company's local representative, who is acting as agent in behalf of the company, and such deliveries comply with the terms of such orders.

No shipments of cars are made by the company into Massachusetts, except cars shipped in fulfillment of orders, as aforesaid, previously given and approved.

The company maintains at its place of business in Boston, as a part of its business, a used-car department, where it sells used cars of its own and other makes which have been taken by it as part con-

sideration in the sale of new cars sold in the manner above set forth. A stock of such cars is kept here for sale. In determining the price of these cars the local office is furnished a list of prices by the home office, and the sales are made from orders, as stated above. The business done in this department amounted, during the year for which the tax in question was paid to \$41,000.00 out of a total business of \$246,000.00 done by the company here during the same period. This is the usual course of all companies engaged in the automobile business.

The company's experts would testify that, in their opinion, an abandonment of the second-hand car business would seriously impair their sales of new cars unless all their competitors, including domestic corporations, should at the same time abandon this method of doing business.

The petitioner keeps in its repair shop in Boston a stock of repair parts, used in repairing its own make of machines previously sold by the Locomobile Company of America regardless of manner and place of sale. The stock of repair parts so kept amounts to \$16,000 on the average and the repairs made at the Boston place of business amount to \$27,000, annually. This is the usual course of all companies engaged in the automobile business.

The company's experts would testify that, in their opinion, an abandonment of the repair business would seriously impair their sales of new cars unless all their competitors, including domestic corporations, should at the same time abandon this method of doing business.

The foregoing facts are the same as agreed to in connection with the petition of this petitioner filed in this court and dismissed in accordance with the opinion of the full court reported in 218 Mass. 558, and now pending before the United States Supreme Court on writ of error (under the title of Cheney Brothers Company et al., Plaintiffs in Error v. The Commonwealth of Massachusetts, No. 314

October Term 1915) except the amount of the authorized capital stock, the amount of the tax sought to be recovered and the figures indicating the amount of business in different respects done for the year in question.

In 1913 the company increased its authorized capital stock from \$5,000,000 to \$6,500,000, of which \$6,250,000 has been paid in. This additional capital stock was used solely to extend and improve the company's manufacturing plant in Bridgeport, Connecticut, and to increase its business of manufacturing and selling automobiles to be delivered from that plant, as above described.

No part thereof, was used for the purpose of increasing the business of selling used cars or of making repairs, transacted as aforesaid at its Boston place of business.

The tax or taxes in controversy amount to \$1,300.00 being the tax or taxes for the year 1915 and were paid on May 11th, 1915.

The petitioner asked the Judge to make the following rulings of law:

1. As applied to the petitioner, the foreign corporation excise tax of Massachusetts, assessed and levied on it under section 56 of Part

III of c. 490, of the Acts of 1909 and chapter 724 of the Acts of 1914, is unconstitutional and void, because it conflicts with the "commerce" clause contained in Section 8 of Article 1, of the Federal Constitution.

2. As applied to the petitioner, the said excise tax is unconstitutional and void, because it is in contravention of the "due process of laws" clause contained in the Fourteenth Amendment to the Federal Constitution.

3. As applied to the petitioner, the said excise tax is unconstitutional and void, because it conflicts with the "equal protection of the laws" cause contained in the Fourteenth Amendment to the Federal Constitution.

4. As applied to the petitioner, the said excise tax is unconstitutional and void under the principles set forth in the *Western Union* and *Pullman* decisions (216 U. S. 1, 56), which apply to business corporations engaged in interstate commerce, and are not confined in their application, to quasi-public corporations.

5. The principles of the *Western Union* decisions (216 U. S. 1, 56) apply wherever, as here, the same instrumentalities and the same agencies carry on in the same places interstate commerce and domestic business in conjunction with each other.

In an excise, measured, as here and in the *Kansas* tax, by the entire authorized capital, it is totally unnecessary to show  
10 that the domestic business is "inextricably interwoven" with the interstate commerce transacted by the same instrumentalities, or to prove that the interstate and intrastate business cannot be separated, or that they are carried on in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate commerce. Such factors did not appear in the *Kansas* tax.

It suffices to show, as here, that the two classes of business, interstate and domestic, are carried on, in conjunction, by the same agencies and at the same places. If so, a tax of this description necessarily burdens to a substantial degree the interstate business of the company, as was held in the *Western Union* case.

The *Baltic* decision (231 U. S. 68) only applies to cases where the local business is carried on wholly apart from the interstate commerce.

6. If the local or domestic business is fairly incident to interstate commerce transacted here, which constitutes the great bulk of the total business, the said tax, imposed for the privilege of carrying on such local business, is unconstitutional under the "commerce" clause.

7. As applied to the petitioner, the amount of said excise is "unduly great," having reference to the real value of the local business and the property used therein, and is so "disproportioned" to the volume and profits of the local business and to the value of the privilege taxed that it should be regarded as a mere "device" to reach or burden the interstate portion of the company's commerce, property, and profits, and, consequently, is unconstitutional.

8. If, as here, the petitioner is engaged in this State in the work of conducting some kind of interstate commerce, as their principal

function, and in connection therewith, and by the same instrumentalities, a small percentage of local business, a tax measured by the entire capital, both interstate and domestic, is unconstitutional because its necessary effect is to burden directly and substantially the interstate portion of the company's capital, business, and property, and is, consequently, based on an unlawful measure, as was decided in the case of the Kansas tax in precisely the same terms as the statute of 1909 here involved (216 U. S. 1, 55).

9. As applied to the Petitioner, the said tax under the said Act of 1914 is unconstitutional because it does not afford "equal protection of the laws," in that it arbitrarily and without reason classifies companies having less than \$10,000,000 capital and those having in excess of that amount, and arbitrarily taxes the former class, consisting of the smaller corporations, at a rate twice as high as that imposed by reason of such excess on the larger and richer corporations, thereby unfairly and arbitrarily discriminating in favor of those best capable of standing the burdens of taxation.

10. The said tax under said Act of 1909 is also unequal and unconstitutional, under the "equal protection of the laws" clause, because it charges, without discrimination, the same rate for the local privilege without regard to whether the company's local business amounts to 1 per cent or 99 per cent of its total sales or commerce here transacted, and because, further, the provision for a maximum of \$2,000 unfairly and unequally discriminates against the smaller corporations, the corporation with \$10,000,000 capital paying precisely the same as that with \$100,000,000 capital and paying nothing whatever on its capital in excess of \$10,000,000.

11. If, as in the case of the petitioner, the company receives as a part of the consideration for sale of new machines for delivery in this State from another State, old second-hand machines and if its sales here made are confined to the resale of these second-hand machines and if it does no local business other than repairing machines sold in interstate commerce; and if, further the abandonment of the privileges of reselling second-hand machines or making such repairs would necessarily affect substantially the amount of sales made by the company for delivery from another State into this State, then the local business is fairly incident to its interstate commerce and the said excise is unconstitutional because it necessarily burdens the interstate commerce of the company. The said excise tax does not apply to such a company; and, if so applied, would be unconstitutional under the Federal Constitution.

12. Although a tax otherwise lawful may, in some instances, be measured by capital or gross receipts, the Massachusetts excise uses an unlawful and unconstitutional measure, because, being measured by the entire capital stock, it necessarily affects directly and substantially that part of the capital employed in interstate commerce or outside of this state, as was held as to the Kansas tax in precisely the same terms as said Act of 1909 (216 U. S. 1, 56).

13. In the case of the petitioner, the increase of capital resulted in an increased tax of \$300. per annum.

If as is shown, the increased capital was all invested outside of the

State, resulting in an increase of interstate commerce, and no increase of domestic business whatever resulted in Massachusetts, it necessarily follows that the increase of the tax must have been paid out of the increase of interstate business and necessarily became a direct burden on interstate commerce or property outside of the State, in which Massachusetts has no interest, and, the said excise is, therefore, unconstitutional.

14. St. 1909, c. 490 Part III, sec. 56, as amended by St. 1914, c. 724, as applied to each of these petitioners is unconstitutional under the Massachusetts Constitution, because it exceeds the power of the Legislature to impose and levy "reasonable" duties and excises, as limited by Part 2 c. 1, sec. 1, Art. 4 of the Massachusetts Constitution.

The Massachusetts excise is wholly unreasonable.

15. The petitioner, upon the agreed facts, is entitled to recover the tax paid by it.

The Judge refused to make said rulings and ordered the entry of a decree dismissing the bill to which rulings and refusals to rule the petitioner took an exception and prays that petitioner's exceptions may be allowed.

By its solicitors,

CHARLES A. SNOW,  
E.  
WM. P. EVERTS.

Filed March 15, 1916.

March 15, 1916. Allowed.

WILLIAM CALEB LORING,

Copy.

J. S. J. C.

Attest:

\_\_\_\_\_, Clerk.

[Endorsed:] No. —, Eq. —. The Locomobile Co. v. Commonwealth. Petitioner's Bill of Exceptions. Suffolk County.

13 And afterwards, to wit, on the thirteenth day of September A. D. Nineteen hundred and Seventeen it was ordered by our said Supreme Judicial Court for the Commonwealth, as follows, viz:

14 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Sept. 13, 1917.

In the case of The Locomobile Company of America vs. Commonwealth of Massachusetts, pending in the Supreme Judicial Court for the County of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court: viz,—

Petition dismissed with costs.

By the Court,

C. H. COOPER, Clerk.

September 13, 1917.

[Endorsed:] 3A. 24624. Eq. No. 989. Supreme Judicial Court for The Commonwealth. Rescript. Suffolk County. Locomobile Company of America vs. Commonwealth of Massachusetts. Suffolk ss. Supreme Judicial Court. Filed Sep. 14, 1917. John F. Cronin, Clerk.

15 And said rescript was entered in our said Court accordingly. Whereupon the parties appeared, and further hearing being had upon the rescript the following Final Decree was entered by our said Court, viz:

16 COMMONWEALTH OF MASSACHUSETTS,  
*Suffolk, ss:*

Supreme Judicial Court.

LOCOMOBILE COMPANY OF AMERICA

v.

COMMONWEALTH.

*Final Decree.*

This cause came on to be heard after rescript from the full court, and, upon consideration thereof, it is Ordered, Adjudged and Decreed that the petition be, and hereby is, dismissed with costs taxed at nineteen and forty one hundredths (19.40) dollars.

By the Court,

JOHN H. FLYNN,

September 25, 1917.

*Asst. Clerk.*

17 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston, this first day of October in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.]

JOHN F. CRONIN, *Clerk.*

18 COMMONWEALTH OF MASSACHUSETTS:

Boston, September 29, 1917.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of The Locomobile Company vs. Commonwealth, decided on the 13th day of September, 1917.

HENRY WALTON SWIFT,

*Reporter of Decisions.*

19 RUGG, C. J.:

This is a petition for the recovery of the excise tax levied according to the terms of St. 1909, c. 490, Part III, s.s. 56 et seq. upon a foreign

corporation for the privilege of conducting business within this Commonwealth. It was submitted to a single justice upon an agreed statement of facts in every respect the same as that agreed to in connection with the petition of the same petitioner considered and ordered dismissed in 218 Mass. 558, 573 to 575, "except the amount of the authorized capital stock, the amount of the tax sought to be recovered and the figures indicating the amount of business in different respects done for the year in question." The facts need not be here repeated,

as they are set forth in full in the report just cited. The only  
 20 pertinent fact here disclosed and absent from the earlier case is that since that case arose and "in 1913 the company increased its authorized capital stock from \$5,000,000 to \$6,500,000, of which \$6,250,000 has been paid in. This additional capital stock was used solely to extend and improve the company's manufacturing plant in Bridgeport, Connecticut, and to increase its business of manufacturing and selling automobiles to be delivered from that plant, as above described. No part thereof, was used for the purpose of increasing the business of selling used cars or of making repairs, transacted as aforesaid at its Boston place of business." It was held in the earlier decision that its manifestly domestic business of considerable proportions rendered the petitioner subject to the excise tax.

The circumstance that the tax now is somewhat larger because of an increase of capital stock invested wholly outside this Commonwealth is under all the circumstances an immaterial circumstance. The authorized amount of capital stock is not the same as its paid in capital and doubtless is different from its entire capital. As was said in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, at 87, "the  
 Massachusetts statute limits the tax to a maximum of \$2,000.

21 The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

The case at bar seems to us to be governed by that decision. See, also, *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381, and *S. S. White Dental Manufacturing Co. v. Commonwealth*, 212 Mass. 35, both affirmed in 231 U. S. 68. *Attorney General v. Electric Storage Battery Co.*, 188 Mass. 239. The principles declared in *Locomotive Company of America v. Commonwealth*, 218 Mass. 558, 573 to 575, are decisive against every contention put forward by the petitioner. Those principles, so far as governed by the Constitution of the United States, appear to us to be in conformity to the decisions of the Supreme Court of the United States. *Kansas City, Fort Scott & Memphis Railway v. Kansas*, 240 U. S. 227, and cases there re-  
 22 viewed. *Kansas City, Memphis & Birmingham Railroad v. Stiles*, 242 U. S. 111. Since no part of the excise here chal-

lenged was levied under the terms of St. 1914, c. 724, that statute need not be considered.

Petition dismissed with costs.

22½ [Endorsed:] The Locomobile Co. vs. Commonwealth.  
Certified copy of the opinion of the Supreme Judicial Court.

23 COMMONWEALTH OF MASSACHUSETTS,  
*Suffolk, ss:*

Supreme Judicial Court.

Equity.

No. 24624.

THE LOCOMOBILE COMPANY OF AMERICA (Original Petitioner),  
Plaintiff in Error.

v.

COMMONWEALTH OF MASSACHUSETTS (Original Respondent), De-  
fendant in Error.

*Petition for a Writ of Error.*

And now comes The Locomobile Company of America, and says that on the 25th day of September, 1917, the Supreme Judicial Court within and for the County of Suffolk in the Commonwealth of Massachusetts entered final judgment herein in favor of the above named respondent and against the above named petitioner, in which judgment and the proceedings had prior thereto in said cause certain errors were committed, to the prejudice of the above named petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the undersigned corporation, being the petitioner aforesaid, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, to the end that the errors so complained of may be corrected and the said judgment reversed and that a transcript of the record, proceedings and papers in this suit, duly authenticated, may be sent to the Supreme Court of the United States.

24

THE LOCOMOBILE COMPANY OF  
AMERICA,

(Original Petitioner), Plaintiff in Error.

By CHARLES A. SNOW,

WILLIAM P. EVERTS,

(Per C. A. S.).

*Its Solicitors and Counsel.*

25 Writ of error allowed, upon the execution of a bond running to the Commonwealth in the sum of Two Hundred and

Fifty (250) Dollars and executed by the Fidelity and Deposit Company of Maryland, as surety, and Charles A. Snow, as principal.

September 28, 1917.

ARTHUR P. RUGG,

*Chief Justice of the Supreme Judicial Court  
of the Commonwealth of Massachusetts.*

[Endorsed:] Suffolk, ss. Sup. Jud. Ct. No. 24624, Equity. The Locomobile Company of America (Original Petitioner) Plaintiff in Error, v. Commonwealth of Massachusetts (Original Respondent) Defendant in Error. Petition for a Writ of Error. Suffolk, ss. Supreme Judicial Court. Filed Sep. 28, 1917. John F. Cronin, Clerk.

26 COMMONWEALTH OF MASSACHUSETTS.

*Suffolk, ss.:*

Supreme Judicial Court.

Equity.

No. 24624.

THE LOCOMOBILE COMPANY OF AMERICA (Original Petitioner),  
Plaintiff in Error.

v.

COMMONWEALTH OF MASSACHUSETTS (Original Respondent), De-  
fendant in Error.

*Assignment of Errors.*

And now comes The Locomobile Company of America, being the petitioner in the above entitled cause and being the plaintiff in error herein, and with its petition for a writ of error makes and files the following assignment of errors, and says that there is manifest error in that the Supreme Judicial Court within and for the County of Suffolk in the Commonwealth of Massachusetts erred in refusing certain requests for rulings of law herein specified, duly made by the said petitioner, the plaintiff in error herein, which refusal the said petitioner duly excepted to, and otherwise erred in the respects herein set forth, namely:

1. In refusing to rule, pursuant to the 1st request, as follows:

"As applied to the petitioner, the foreign corporation excise tax of Massachusetts, assessed and levied on it under section 56 of Part III of c. 490, of the Acts of 1909 and chapter 724 of the  
27 Acts of 1914, is unconstitutional and void, because it conflicts with the 'commerce' clause contained in Section 8 of Article I, of the Federal Constitution."

2. In refusing to rule, pursuant to the 2nd request, as follows:

"As applied to the petitioner, the said excise tax is unconstitu-

tional and void, because it is in contravention of the 'due process of law' clause contained in the Fourteenth Amendment to the Federal Constitution."

3. In refusing to rule, pursuant to the 3rd request, as follows:

"As applied to the petitioner, the said excise tax is unconstitutional and void, because it conflicts with the 'equal protection of the laws' clause contained in the Fourteenth Amendment to the Federal Constitution."

4. In refusing to rule, pursuant to the 4th request, as follows:

"As applied to the petitioner, the said excise tax is unconstitutional and void, under the principles set forth in the *Western Union* and *Pullman* decisions (216 U. S. 1, 56), which apply to business corporations engaged in interstate commerce and are not confined, in their application, to quasi public corporations."

5. In refusing to rule, pursuant to the 5th request, as follows:

"The principles of the *Western Union* decisions (216 U. S. 1, 56) apply wherever, as here, the same instrumentalities and the same agencies carry on in the same places interstate commerce and domestic business in conjunction with each other."

6. In refusing to rule, pursuant to the 9th request, as follows:

"As applied to the Petitioner, the said tax under the said Act of 1914 is unconstitutional because it does not afford 'equal protection of the laws,' in that it arbitrarily and without reason classifies companies having less than \$10,000,000 capital and those having in excess of that amount, and arbitrarily taxes the former class, consisting of the smaller corporations, at a rate twice as high as that imposed by reason of such excess on the larger and richer corporations, thereby unfairly and arbitrarily discriminating in favor of those best capable of standing the burdens of taxation."

7. In refusing to rule, pursuant to the 11th request, as follows:

"If, as in the case of the petitioner, the company receives as a part of the consideration for sale of new machines for delivery in this State from another State, old second-hand machines and if its sales here made are confined to the resale of these second-hand machines and if it does no local business other than repairing machines sold in interstate commerce; and if, further the abandonment of the privileges of reselling second-hand machines or making such repairs would necessarily affect substantially the amount of sales made by the company for delivery from another State into this State, then the local business is fairly incident to its interstate commerce and the said excise is unconstitutional because it necessarily burdens the interstate commerce of the company."

The said excise tax does not apply to such a company; and, if so applied, would be unconstitutional under the Federal Constitution."

8. In refusing to rule, pursuant to the 12th request, as follows:

"Although a tax otherwise lawful may, in some instances, be measured by capital or gross receipts, the Massachusetts excise uses an unlawful and unconstitutional measure, because, being measured by the entire capital stock, it necessarily affects directly and substantially that part of the capital employed in interstate commerce

or outside of this state, as was held as to the Kansas tax in precisely the same terms as said Act of 1909 (216 U. S. 1, 56)."

In refusing to rule, pursuant to the 13th request, as follows:

"In the case of the petitioner, the increase of capital resulted in an increased tax of \$300. per annum.

If as shown, the increased capital was all invested outside of the State, resulting in an increase of interstate commerce, and no increase of domestic business whatever resulted in Massachusetts, it necessarily follows that the increase of the tax must have been paid out of  
30 the increase of interstate business and necessarily became a direct burden on interstate commerce or property outside of the State, in which Massachusetts has no interest, and, the said excise is, therefore, unconstitutional."

10. In refusing to rule, pursuant to the 14th request, as follows:

"St. 1909, c. 490 Part III, sec. 56, as amended by St. 1914, c. 724, as applied to each of these petitioners is unconstitutional under the Massachusetts Constitution, because it exceeds the power of the Legislature to impose and levy 'reasonable' duties and excises, as limited by Part 2 c. 1, sec. 1, Art. 4 of the Massachusetts Constitution."

11. In refusing to rule, pursuant to the 15th request, as follows:

"The petitioner, upon the agreed facts, is entitled to recover the tax paid by it.

#### THE LOCOMOBILE COMPANY OF AMERICA.

*(Original Petitioner), Plaintiff in Error*

By CHARLES A. SNOW,

WILLIAM P. EVERTS,

*Its Solicitors and Counsel,*

[Endorsed:] Suffolk, ss. Sup. Jud. Ct. No. 24624 Equity. The Locomobile Company of America (Original Petitioner), Plaintiff in Error, v. Commonwealth of Massachusetts (Original Respondent), Defendant in Error. Assignment of errors. Suffolk, ss. Supreme Judicial Court. Filed Sep. 28, 1917. John F. Cronin, Clerk.

31

*Copy of Bond.*

COMMONWEALTH OF MASSACHUSETTS,

*Suffolk, ss.;*

Supreme Judicial Court.

THE LOCOMOBILE COMPANY OF AMERICA, Plaintiff in Error (Original Petitioner),

v.

COMMONWEALTH OF MASSACHUSETTS, Defendant in Error (Original Respondent).

(Bond to Party on Writ of Error.)

Know all men by these presents that we, Charles A. Snow, Attorney of Record for the plaintiff in error in the above suit, as Principal,

and The Fidelity and Deposit Company of Maryland, as surety are held and firmly bound unto the Commonwealth of Massachusetts, the above named respondent and defendant in error, in the full and just sum of Two Hundred and Fifty (250) Dollars to be paid to the said Commonwealth of Massachusetts; to which payment well and truly to be made we bind ourselves, our successors and assigns, heirs, executors and administrators jointly and severally, by these Presents.

Sealed with our seals and dated the twenty-eighth day of September in the year of our Lord one thousand nine hundred and seventeen.

Whereas lately in the Supreme Judicial Court of the Commonwealth of Massachusetts sitting within and for the County of Suffolk in the above suit depending in said Court between The Locomobile Company of America, Petitioner, and the Commonwealth of Massachusetts, Respondent, judgment was rendered against the said petitioner and in favor of the said Commonwealth of Massachusetts, respondent, and the said petitioner, the plaintiff in error herein, having procured a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington thirty days after the date of such citation.

Now the condition of the above obligation is such, that if the said plaintiff in error shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CHARLES A. SNOW, [SEAL.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By ARTHUR L. TASH, [SEAL.]

*Resident Vice-President.*

Attest:

JOHN H. LAUDER,

*Resident Assistant Secretary.*

32 Signed, sealed and delivered in presence of

Approved:

September 28, 1917.

ARTHUR P. RUGG,

*Chief Justice of the Supreme Judicial Court  
of the Commonwealth of Massachusetts.*

Approved:

WM. HAROLD HITCHCOCK,

*Asst. Attorney General.*

[Endorsed:] The Locomobile Co. Copy of Bond.

2—734

## Supreme Court of the United States,

*Citation on Writ of Error.*UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington in the District of Columbia thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Judicial Court of the Commonwealth of Massachusetts within and for the County of Suffolk, wherein The Locomobile Company of America is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts this 28th day of September, in the year of our Lord one thousand nine hundred and seventeen.

ARTHUR P. RUGG,

*Chief Justice of the Supreme Judicial Court  
of the Commonwealth of Massachusetts.*

34 [Endorsed:] The Locomobile Co. of America v. Com'lth of Mass. Citation. Filed Sept. 28, 1917. Attest: John H. Flynn, Asst. Clerk.

September 28th, 1917.

Service of the within citation is acknowledged for the Commonwealth of Massachusetts, defendant in error.

WM. HAROLD HITCHCOCK,

*Assistant Attorney General.*

35 SUFFOLK, ss:

## Supreme Judicial Court,

LOCOMOBILE COMPANY OF AMERICA

VS.

COMMONWEALTH OF MASSACHUSETTS.

*Stipulation.*

It is agreed in the above entitled case that the whole record shall be transmitted to Washington with the writ of error, with the exception of the pleadings.

CHAS. A. SNOW,

WM. P. EVERTS,

*Attorneys for Petitioner.*

WM. HAROLD HITCHCOCK,

*Attorney for Respondent.*

[Endorsed:] Locomobile Company of America vs. Commonwealth of Massachusetts. Stipulation. Suffolk ss. Supreme Judicial Court. Filed Oct. 1, 1917. John F. Cronin, Clerk.

36

*Certificate of Lodgment.*

## Supreme Judicial Court.

I, John F. Cronin, do hereby certify that there was lodged with me as such clerk on September 28, 1917 in the matter of Locomobile Company of America vs. Commonwealth of Massachusetts—

1. The original bond of which a copy is herein set forth.
2. Two copies of the Writ of Error as herein set forth one for the said defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this first day of October, 1917.

[SEAL.]

JOHN F. CRONIN, *Clerk.*

37

COMMONWEALTH OF MASSACHUSETTS.

*Suffolk, ss:*

## Supreme Judicial Court.

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of The Locomobile Company of America, Petitioner, vs. Commonwealth of Massachusetts, Respondent, in said

Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Errors; and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this first day of October in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.]

JOHN F. CRONIN, *Clerk*.

Endorsed on cover: File No. 26,201. Massachusetts Supreme Judicial Court. Term No. 734. The Locomobile Company of America, plaintiff in error, vs. The Commonwealth of Massachusetts. Filed October 6th, 1917. File No. 26,201.

and The Fidelity and Deposit Company of Maryland, as surety are held and firmly bound unto the Commonwealth of Massachusetts, the above named respondent and defendant in error, in the full and just sum of Two Hundred and Fifty (250) Dollars to be paid to the said Commonwealth of Massachusetts; to which payment well and truly to be made we bind ourselves, our successors and assigns, heirs, executors and administrators jointly and severally, by these Presents.

Scaled with our seals and dated the twenty-eighth day of September in the year of our Lord one thousand nine hundred and seventeen.

Whereas lately in the Supreme Judicial Court of the Commonwealth of Massachusetts sitting within and for the County of Suffolk in the above suit depending in said Court between The Locomobile Company of America, Petitioner, and the Commonwealth of Massachusetts, Respondent, judgment was rendered against the said petitioner and in favor of the said Commonwealth of Massachusetts, respondent, and the said petitioner, the plaintiff in error herein, having procured a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington thirty days after the date of such citation.

Now the condition of the above obligation is such, that if the said plaintiff in error shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CHARLES A. SNOW, [SEAL.]  
FIDELITY AND DEPOSIT COM-  
PANY OF MARYLAND.

By ARTHUR L. TASH, [SEAL.]  
*Resident Vice-President.*

Attest:

JOHN H. LAUDER,  
*Resident Assistant Secretary.*

32 Signed, sealed and delivered in presence of

Approved:

September 28, 1917.

ARTHUR P. RUGG,

*Chief Justice of the Supreme Judicial Court  
of the Commonwealth of Massachusetts.*

Approved:

WM. HAROLD HITCHCOCK,

*Asst. Attorney General.*

[Endorsed:] The Locomobile Co. Copy of Bond.

## Supreme Court of the United States.

*Citation on Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington in the District of Columbia thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Judicial Court of the Commonwealth of Massachusetts within and for the County of Suffolk, wherein The Locomobile Company of America is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts this 28th day of September, in the year of our Lord one thousand nine hundred and seventeen.

ARTHUR P. RUGG,

*Chief Justice of the Supreme Judicial Court  
of the Commonwealth of Massachusetts.*

34 [Endorsed:] The Locomobile Co. of America v. Com'lth of Mass. Citation. Filed Sept. 28, 1917. Attest: John H. Flynn, Asst. Clerk.

September 28th, 1917.

Service of the within citation is acknowledged for the Commonwealth of Massachusetts, defendant in error.

WM. HAROLD HITCHCOCK,

*Assistant Attorney General.*

35 SUFFOLK, ss.

## Supreme Judicial Court.

LOCOMOBILE COMPANY OF AMERICA

VS.

COMMONWEALTH OF MASSACHUSETTS.

*Stipulation.*

It is agreed in the above entitled case that the whole record shall be transmitted to Washington with the writ of error, with the exception of the pleadings.

CHAS. A. SNOW,

WM. P. EVERTS,

*Attorneys for Petitioner.*

WM. HAROLD HITCHCOCK,

*Attorney for Respondent.*

[Endorsed:] Locomobile Company of America vs. Commonwealth of Massachusetts. Stipulation. Suffolk ss. Supreme Judicial Court. Filed Oct. 1, 1917. John F. Cronin, Clerk.

36 *Certificate of Lodgment.*

## Supreme Judicial Court.

I, John F. Cronin, do hereby certify that there was lodged with me as such clerk on September 28, 1917 in the matter of Locomobile Company of America vs. Commonwealth of Massachusetts—

1. The original bond of which a copy is herein set forth.

2. Two copies of the Writ of Error as herein set forth one for the said defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this first day of October, 1917.

[SEAL.]

JOHN F. CRONIN, *Clerk.*37 COMMONWEALTH OF MASSACHUSETTS,  
*Suffolk, ss.*

## Supreme Judicial Court.

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of The Locomobile Company of America, Petitioner, vs. Commonwealth of Massachusetts, Respondent, in said

Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Errors; and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this first day of October in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.]

JOHN F. CRONIN, *Clerk*.

Endorsed on cover: File No. 26,201. Massachusetts Supreme Judicial Court. Term No. 734. The Locomobile Company of America, plaintiff in error, vs. The Commonwealth of Massachusetts. Filed October 6th, 1917. File No. 26,201.

# Supreme Court of the United States

OCTOBER TERM, 1917.

No. 733.

INTERNATIONAL PAPER COMPANY,

*Plaintiff in Error,*

*v.*

COMMONWEALTH OF MASSACHUSETTS.

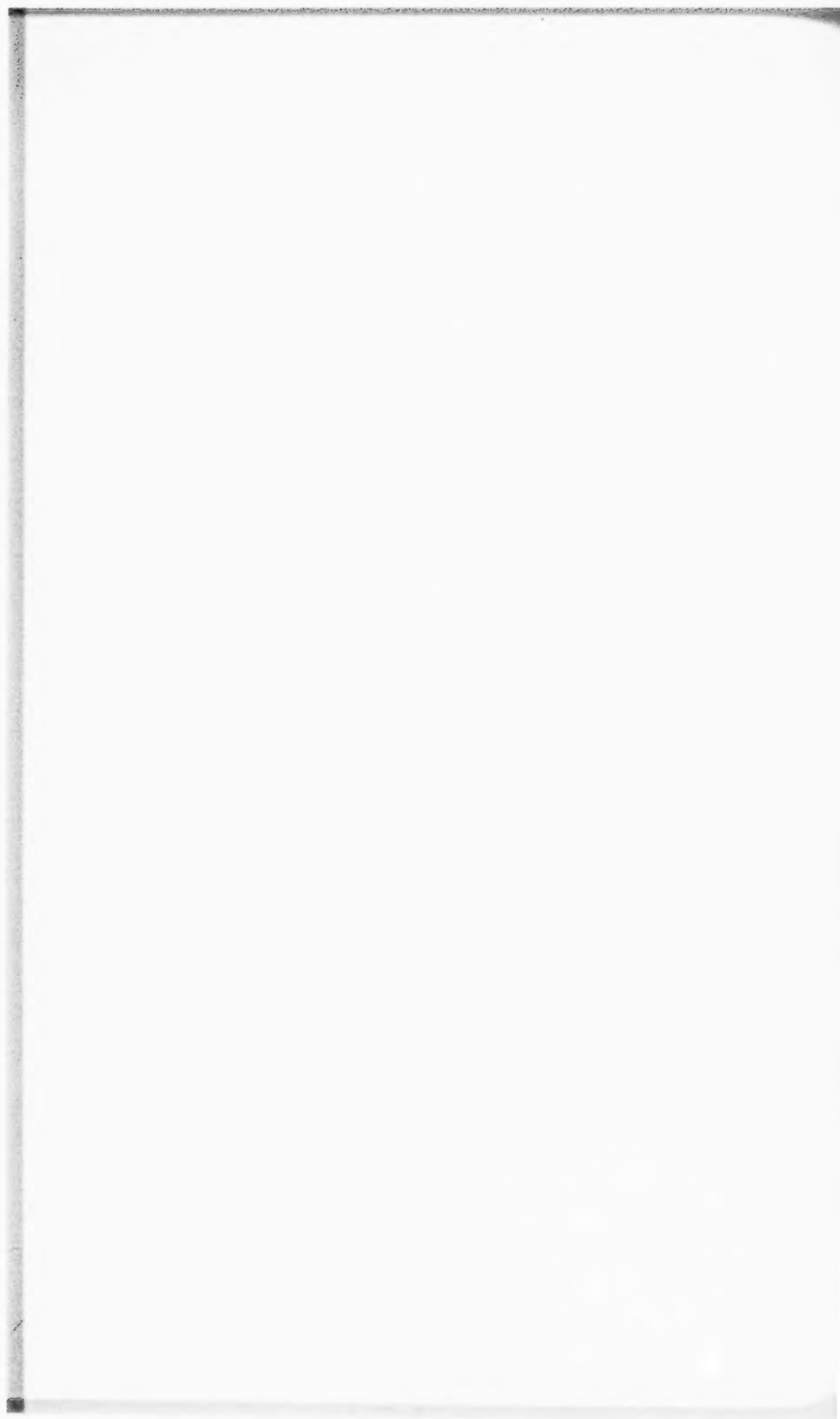
---

IN ERROR TO THE SUPREME JUDICIAL COURT  
OF MASSACHUSETTS.

---

BRIEF OF MALCOLM DONALD AS  
AMICUS CURIÆ.

BOSTON  
PRESS OF GEO. H. ELLIS CO.  
1917



## SUBJECT INDEX.

	PAGE
STATEMENT OF CASE . . . . .	1
STATUTES	
For taxation of foreign corporations . . . . .	3
For taxation of domestic corporations . . . . .	5
ARGUMENT:	
INTRODUCTION . . . . .	7
PART I—GENERAL IMPORTANCE OF QUESTION . . . . .	8
PART II—EFFECT OF COMMERCE CLAUSE . . . . .	10
1. Analysis of Previous Cases . . . . .	10
(a) Western Union Case . . . . .	11
(b) Summary of Western Union Opinions . . . . .	13
(c) The Pullman Case . . . . .	13
(d) Affirming Cases . . . . .	14
(e) Baltic Case . . . . .	14
(f) <i>Kansas City, etc., Ry. v. Kansas</i> . . . . .	16
(g) <i>Kansas City, etc., Ry. v. Stiles</i> . . . . .	17
(h) <i>Albert Pick Co. v. Jordan</i> . . . . .	19
(i) Summary of General Principles . . . . .	19
2. Application of Principles to Petitioner . . . . .	21
(a) The Tax . . . . .	21
(b) Relation between Petitioner's Local and Inter- state Business . . . . .	23
(1) General Description of Massachusetts Business . . . . .	23
(2) Effect upon Interstate business of Burden on Local Business . . . . .	24
PART III—EFFECT OF EQUAL PROTECTION OF LAWS CLAUSE, .	28
1. Property of Petitioner in Massachusetts . . . . .	28
2. Discriminatory Nature of the Tax . . . . .	30
PART IV—EFFECT OF DUE PROCESS OF LAW CLAUSE . . . . .	34
CONCLUSION . . . . .	36

## LIST OF CASES CITED.

	PAGE
<i>Atchison, Topeka &amp; Santa Fe Ry. Co. v. O'Connor</i> , 223 U. S. 280	14
<i>Baltic Mining Co. v. Commonwealth</i> , 231 U. S. 68	10, 14, 20
<i>Horn Silver Mining Co. v. New York</i> , 143 U. S. 305	10
<i>Kansas City, Fort Scott &amp; Memphis Ry. Co. v. Kansas</i> , 240	
U. S. 227	16, 20
<i>Kansas City, Memphis &amp; Birmingham Ry. Co. v. Stiles</i> , 242	
U. S. 111	17, 20
<i>Keystone Watch Case Co. v. Commonwealth</i> , 212 Mass. 50	25
<i>Kidd v. Pearson</i> , 128 U. S. 1	27
<i>Ludwig v. Western Union Telegraph Co.</i> , 216 U. S. 146	14
<i>Pick, Albert Co. v. Jordan</i> , 244 U. S. 647	19
<i>Pullman Co. v. Kansas</i> , 216 U. S. 56	10, 13
<i>Pullman Co. v. Adams</i> , 189 U. S. 420	26
<i>S. S. White Dental Mfg. Co. v. Commonwealth</i> , 212	
Mass. 35	35
<i>Southern Ry. Co. v. Greene</i> , 216 U. S. 400	28, 32
<i>Western Union Tel. Co. v. Kansas</i> , 216 U. S. 1	10, 11, 34

# Supreme Court of the United States

OCTOBER TERM, 1917.

No. 733.

---

INTERNATIONAL PAPER COMPANY, *Plaintiff in*  
*Error,*

*v.*

COMMONWEALTH OF MASSACHUSETTS.

---

IN ERROR TO THE SUPREME JUDICIAL COURT OF  
MASSACHUSETTS.

---

BRIEF OF MALCOLM DONALD AS AMICUS  
CURIÆ.

---

## STATEMENT OF THE CASE.

This is a writ of error brought to reverse a decree entered by the Supreme Judicial Court of Massachusetts on September 25, 1917, in accordance with a rescript from the full court dismissing the petition of the plaintiff in error to recover the amount of two foreign corporation taxes paid by it to the Commonwealth of Massachusetts on May 11, 1915.

The assignments in error present in different forms the claim that the tax or taxes in question were imposed in violation of the "commerce clause" of the Federal Constitution and of the "due process of law" and "equal protection

of the laws" clauses of the Fourteenth Amendment. The plaintiff in error will be referred to in this brief as the petitioner.

The Agreed Statement of Facts shows the following facts:—

That the total authorized stock of the petitioner during the year 1915 was \$45,000,000 (of which between \$39,000,000 to \$40,000,000 was issued) and that the taxes imposed upon the petitioner on May 22, 1915, under the statutes (hereinafter set forth) were \$5,500.

The petitioner during the year 1915 carried on the business of paper manufacturing, operating twenty-three paper mills and plants in connection with its business, of which all but one were located in various states other than Massachusetts. The petitioner at that time owned and operated a paper mill in Montague, Massachusetts, comprising real estate, water power, machinery and personal property, the assessed value of which in 1915 was \$472,000.

The petitioner qualified to do business in Massachusetts in the year 1898 and the Massachusetts plant above referred to was acquired by the petitioner in that year. Various additions were made to the plant by the petitioner during the years 1903 to 1907. A paper mill requires for its operation a plant, water power buildings and special machinery and appliances of special nature and construction. A very important part of the required investment consists of water power, sluiceways, machinery and appliances of special construction, much of which are of no use in any other business than paper manufacturing.

If the petitioner should abandon its plant in Massachusetts, this plant would be worth its present fair market value only in case it could be sold as a whole for paper manufacturing purposes. Otherwise, it is probable that the petitioner's plant could be sold only at a substantial loss. Not more than  $1\frac{3}{4}$  per cent. in value of the total assets of the petitioner are located in Massachusetts. The petitioner maintained during the year 1915 in Boston,

Massachusetts, a sales office at which the petitioner employed two salesmen, who negotiated contracts of sale subject to the approval of the New York office. At the Boston office there was also maintained a book-keeping and clerical force in connection with the business done by the two salesmen. Of the sales negotiated through the Boston sales office about 86 per cent. covered goods shipped from plants of the petitioner outside Massachusetts to purchasers in Massachusetts or covered shipments from the Massachusetts plant to purchasers outside of Massachusetts and only about 14 per cent. represented sales of goods delivered to Massachusetts purchasers from the Massachusetts plant.

No stock of goods was kept in Massachusetts from which current sales might be made. Most of the business of the petitioner consisted of the manufacture of paper to fill orders upon long-term contracts with newspapers. The petitioner's principal executive offices were located at New York and there was no executive office in Massachusetts. Stockholders' and directors' meetings were not held in Massachusetts and bank accounts were not kept there.

#### THE STATUTES ABOVE REFERRED TO.

#### TAXES ON FOREIGN CORPORATIONS.

1909, c. 490, Part III. SECTION 56. Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars.

## ACTS OF 1914, CHAPTER 724.

## AN ACT RELATIVE TO THE TAXATION OF FOREIGN CORPORATIONS.—

Be it enacted, etc., as follows:

SECTION 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III. of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition.

SECTION 2. All laws now or hereafter in force relating to the assessment and collection of the tax imposed by said section fifty-six and all laws providing for appeal from any assessment made under said section fifty-six or for the recovery of any tax assessed thereunder shall, except so far as they are inconsistent with the provisions of this act, apply to the tax imposed by this act.

SECTION 3. This act shall take effect upon its passage. (Approved July 1, 1914.)

1909, c. 490, Part III., SECTION 70. Any corporation or association aggrieved by the exaction of said tax or excise or of any portion thereof may, within six months after the payment of the same, whether such payment be after or before the issue of the warrant mentioned in the preceding section, apply by petition to the supreme judicial court, setting forth the amount of the tax or excise and costs thereon so paid, the general legal grounds and the specific grounds in fact, if any, upon which it is claimed such tax or excise should not have been exacted. Said petition shall be the exclusive remedy and shall be entered and heard in the county of Suffolk. A copy of the same shall be served upon the treasurer and receiver general and upon the attorney-general. The proceedings upon such petition shall conform, as nearly as may be, to proceedings in equity, and an abatement shall be made of only such portion of the tax or excise as was assessed without authority of law. In

case said tax or excise has heretofore been exacted or is hereafter exacted in consequence of any law or statute of any other state of the United States, then the application above provided for may be made at any time within six years after the exaction of said tax or excise or any portion thereof.

#### TAXES ON DOMESTIC CORPORATIONS.

ACTS OF 1909, CHAPTER 490, PART III. (AS AMENDED.)

SECTION 41. The tax commissioner shall ascertain from the returns or otherwise the true market value of the shares of each corporation subject to the requirements of the preceding section, and shall estimate therefrom the fair cash value of all of said shares constituting its capital stock on the preceding first day of April, which, unless by the charter of a corporation a different method of ascertaining such value is provided, shall, for the purposes of this part, be taken as the true value of its corporate franchise. From such value there shall be deducted:

Third, In case of a domestic business corporation, the value of the works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, and of securities which if owned by a natural person resident in this commonwealth would not be liable to taxation; also the value of its property situated in another state or country and subject to taxation therein. There shall not be deducted the value of securities which if owned by a natural person resident in this commonwealth would be liable to taxation, nor shall there be deducted the value of any shares of stock of the corporation itself owned directly or indirectly by it or for its benefit; and the tax commissioner in determining for the purposes of taxation the value of the corporate franchise of any such corporation shall not take into consideration any debts of such corporation unless the returns required from it contain a statement duly signed and sworn to, setting forth that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it.

For the purposes of this section the tax commissioner may take the value at which such works, structures, real estate,

machinery, poles, underground conduits, wires and pipes are assessed at the place where they are located as the true value, but such local assessment shall not be conclusive of the true value thereof.

**SECTION 42.** The tax commissioner may require a corporation to prosecute an appeal from the valuation of its works, structures, real estate, machinery, poles, underground conduits, wires and pipes by the assessors of a city or town, either to the county commissioners or to the superior court, whose decision shall be conclusive upon the question of value. Upon such an appeal the tax commissioner may be heard, and in the superior court costs may be awarded as justice requires.

**SECTION 43.** Every corporation subject to the provisions of section forty shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section forty-one, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid, the annual rate to be determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same year, as returned by the assessors of the several cities and towns under the provisions of section fifty-nine of Part I., after deducting therefrom the amount of tax assessed upon polls for the preceding year, as certified to the tax commissioner, upon the aggregate valuation of all cities and towns for the preceding year, as returned under sections fifty-nine and sixty of Part I.; but the said tax upon the value of the corporate franchise of a domestic business corporation, after making the deductions provided for in section forty-one, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, poles, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this commonwealth would be liable to taxation; and the total amount of the tax to be paid by such corporation in any year upon its property locally taxed in this commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner.

## ARGUMENT.

---

### INTRODUCTION.

Leave is asked to file this brief because various corporations other than the petitioner have been subjected to taxes under chapter 724 of the Acts of 1914, and have filed petitions to recover these taxes, and it is desired to present to the Court an argument upon the general effect of the Statute of 1914. This should not be done, however, without stating that the facts with regard to those other corporations may differ very radically from the facts with regard to this petitioner in various respects. For that reason, if the decision in this case should turn upon any of the special facts arising therein, it should be borne in mind that other cases, involving, no doubt, some of the same general principles, may present specific facts entirely different and that such cases are already pending. Among the more prominent special facts in which the cases of other corporations may differ from those of the petitioner are the following:—

- (1) The amount of the tax.
- (2) The amount and character of permanent property situated in Massachusetts.
- (3) The closeness of the relation between the intrastate business in Massachusetts and the interstate business and the resulting necessary effect upon the interstate business of a tax upon the intrastate business.
- (4) The total amount of interstate business done throughout the country.

This brief will discuss the general principles involved in the case without considering in detail the specific assignments of error.

## PART I.

### IMPORTANCE AND GENERAL EFFECT OF THE QUESTION.

The question involved in this case is important for its general effect throughout the country. Nearly all the states impose franchise taxes upon foreign corporations doing business within their borders. In most cases these taxes are in addition to local property taxes; in many cases they are measured by the capital employed in the respective states; in other cases they are measured by the total capital of the corporation. Of the latter, a number are subject to reasonable maximum limits. A general summary of the statutes was prepared for the Department of Commerce in March, 1915, and was printed by the Government Printing Office under the title, "Report of the Commissioner of Corporations on State Laws Concerning Foreign Corporations."

Franchise taxes measured by the total capital and not limited in amount may become very burdensome upon large corporations, if their constitutionality becomes unquestioned. One tax on capital of one one-hundredth of 1 per cent. a year may seem small, but if a corporation were subject to such a tax in twenty states, it would be paying annually one-fifth of 1 per cent. of its capital, or, if it earned as much as 10 per cent. on its capital, 2 per cent. annually on its income. That would be the penalty of doing business in many states, and it would apply to the widely extended businesses—the businesses most essential to interstate commerce. The really serious possibility of such a penalty arises when the corporation franchise tax measured by the total capital stock is imposed without any maximum limit. The Massachusetts situation is exactly in point. Before 1914 the tax could not exceed \$2,000 per year. A corporation having \$10,000,000 of capital was subject to the maximum tax.

A corporation of that capital is hardly likely to have places of business in a great many states. The corporations of larger capital, however, cover the whole country and frequently have places of business in more than twenty states. The removal of the maximum limit, therefore,—in the same manner as the limit was removed in Massachusetts in 1914,—for such large corporations greatly increases the burden. A slight increase in the rate of tax would make the burden far greater.

If this system of taxation became general, there would be no doubt of the actual double taxation nor of the actual burden on interstate commerce. The financial hardship upon the large corporation and upon its interstate transactions (which the small and local corporation would escape) would be obvious. The only question would be whether the Court could look through the form of the statutes to its essential effect, or whether, on account of the technically correct form of the statutes, the Court could not take notice of the burden on interstate commerce.

What one state may do, others may do also. There are other states than Massachusetts, with maximum limits on their franchise taxes, and still others which might be glad to change the measure of their taxes to a more remunerative scale, if the constitutionality were clear. If the present statute is sustained, the way will be open for the states to lay upon corporations carrying on business in many states a tax really measured by their general business in the aggregate equivalent to a substantial income tax, which will not apply to similar local businesses. It is the fear of this kind of taxation which makes this case so vitally important to many other corporations besides the petitioner in this case.

## PART II.

### EFFECT OF THE INTERSTATE COMMERCE CLAUSE.

#### I. ANALYSIS OF THE PREVIOUS CASES.

The tax in this case differs from the tax already passed upon by this Court in *Baltic Mining Company v. Commonwealth*, 231 U. S. 68 (1913), because the present tax is really proportionate to the total capital stock and not limited to \$2,000. It is impossible to determine the legal effect of this difference without analyzing carefully the opinions in the comparatively few cases before this Court which have passed upon substantially similar statutes. Before the decisions in *Western Union Telegraph Company v. Kansas*, 216 U. S. 1 (1910) and *Pullman Co. v. Kansas*, 216 U. S. 56 (1910), general principles with regard to the right of a state to lay franchise taxes had been established—but in the Kansas cases, for the first time in this Court, there came for review a tax upon the total capital stock of a corporation doing both interstate and local business in the state imposing the tax. The Court carefully reviewed previous cases and differentiated them. Among others the case of *Horn Silver Mining Co. v. New York*, 143 U. S. 305, so often referred to in subsequent arguments was carefully distinguished on the ground that the Horn Company did no interstate commerce at all in New York, the state in question. (See *Pullman Case*, 216 U. S. 56 at p. 71.) Since the Kansas cases, other cases upon similar statutes have been decided, and the statutes have been sustained, but never without reaffirming the Kansas cases. The essential task, therefore, is to determine whether, upon any reasonable ground, this case can be distinguished from the Kansas cases. A brief analysis of the opinions is here presented.

### A. *Western Union Case.*

The first case is *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1 (1910). The statute of Kansas there in question imposed a tax of one-fiftieth of 1 per cent. on all authorized capital above five hundred thousand dollars (\$500,000) and a tax at a slightly higher rate on the capital below five hundred thousand dollars (\$500,000). It was an initial tax, that is to say, it was payable once, not annually, and it was imposed upon both foreign and domestic corporations so that there was no question of discrimination. It was assessed upon the privilege of doing local business. The Telegraph Company had an authorized capital of \$100,000,000, so that the tax upon it amounted to \$20,100.

The opinion of the Court was given by Harlan, J., with whom concurred Brewer, Day and Moody, JJ. This opinion, after reviewing previous decisions, says (page 27) that regardless of the fact that the statute, in form, taxed only local business, yet if it, reasonably interpreted, directly or by necessary operation, burdened interstate commerce, it would be invalid. The opinion then goes on to say (page 30 *et seq.*) that the necessary effect of the statute in question was to burden and tax the company's interstate business and its property outside the state. It clearly appeared that the Telegraph Company was carrying on both interstate and local business. It did not appear nor could it be assumed that the tax in question was so large that it would prevent the carrying on of the local business, and the only emphasis laid upon the connection between the local business and the interstate was contained in the following quotations:—

(Page 33.) "The State knows that the Telegraph Company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business" and

(Page 37.) "We cannot fail to recognize the intimate connection which, at this day, exists between the

interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business."

The tax was clearly understood to be an excise upon the privilege of doing local business. It is true that there are statements in the opinion which, taken alone, read as if the tax were considered to be a property tax, or a privilege tax levied directly upon interstate commerce, but taking the opinion as a whole, it must be clearly understood to rest upon the proposition that the tax was an excise upon the privilege of doing local business, but as such, in view of the nature of the business of the Telegraph Company, was a burden upon the interstate business of the petitioner and its property outside the state.

The opinion says nothing of the nature of the property of the Telegraph Company in Kansas.

The concurring opinion of White, J., rests almost entirely upon the fact that the Telegraph Company before the imposition of the tax had made a large investment in permanent property in Kansas which was suitable for doing both interstate and intrastate commerce, and was not suitable for use in interstate commerce alone, so that the Company could not give up its local business without suffering considerable loss.

The dissenting opinion of Holmes, J., with whom concurred Fuller, C. J., and McKenna and Peckham, J., rested upon the basis that since the principle had been established that a state could absolutely prevent a corporation from coming within its borders to do local business, therefore a state could grant this privilege upon any condition whether reasonable or not, and regardless of the effect upon interstate commerce.

### B. *Summary of Western Union Company Opinions.*

These three opinions foreshadow the principal positions to be taken in all the later cases dealing with the same or similar statutes.

The opinion of the Court took the view that in this case the tax upon the privilege of doing local business was an interference with interstate commerce because measured by the interstate commerce of the company and its property outside the state, and the Court recognizes that it was convenient for the public and economical for the company to do local business in connection with its interstate commerce.

The concurring opinion took the view that the tax in question, upon the privilege of doing local business, was an interference with interstate commerce, not simply in view of the convenience or economy of the company's doing local business with its interstate commerce, but because the company had acquired permanent property suitable for use in connection with both kinds of business, so that the giving up of the local business would presumably result in considerable loss to the company.

The dissenting opinion stated that, as in theory interstate commerce and local business are separable, therefore no amount of taxation upon local business can affect the interstate commerce sufficiently directly to conflict with the Constitution.

### C. *The Pullman Case.*

The next case was *Pullman Company v. Kansas*, 216 U. S. 56 (1910). This case concerned the same statute as the last case, but the Pullman Company apparently owned no property in Kansas which could not be easily removed.

According to the opinion of the Court, there was no distinction between this case and the last, since the Court did not rely in any way upon the fact that the Telegraph Com-

pany owned permanent property in Kansas. Therefore, the Court relied entirely upon the former case. So, also in the dissenting opinion, this case was as clear as the last, and the dissent was renewed.

For the rest of the Court, however, this case presented a radically new situation, and the concurring opinion clearly indicates an appreciation of the difficulty. Granting for argument, but not admitting, that no part of the cars should be considered as permanently in Kansas, the concurring opinion faced the question squarely and said that if a corporation is engaged in both interstate and local business, the prohibition or undue taxation of its local business is an undue burden upon its interstate business. This opinion does not even rely upon the convenience or economy of carrying on the two kinds of business together, or upon any connection between them. It is enough that the corporation is actually engaged in carrying on both kinds of commerce in the state.

#### D. *Affirming Cases.*

The cases just stated were affirmed in the following cases, which need be noticed only as follows, since the opinions do not add to the discussion of the principles involved.

*Ludwig v. Western Union Tel. Company*, 216 U. S. 146 (1910), concerned a statute so similar to the Kansas statute that it raised no new question.

*Atchison, Topeka and Santa Fe Ry. Co. v. O'Connor*, 223 U. S. 280 (1912), concerned a railroad which apparently had some local property and arose under a Colorado statute which imposed a tax at the rate of two cents for each thousand dollars—a very small tax.

#### E. *The Baltic Case.*

The next case of importance was—*Baltic Mining Co. v. Commonwealth*, 231 U. S. 68 (1913). The Baltic Mining Company owned a mine in Michigan and its products

were sold in many states, 5 per cent. being sold in Massachusetts; but on account of the fact that the sales were made entirely through an independent selling agent it is doubtful whether the Baltic Company itself did any interstate commerce. Its executive offices were in Massachusetts. The tax to which the company was subjected was, under the Massachusetts Statute of 1909, Chapter 490, Part III, Section 56, an annual tax of one-fiftieth of 1 per cent. on its authorized capital with a maximum limit of \$2,000 and the tax in question amounted to five hundred dollars (\$500).

With the Baltic case was heard the White case, and one opinion was given for both cases. The White case arose under the same Massachusetts statute as the Baltic case, and the tax in question was \$200. The case concerned a manufacturing company which sold its own goods in many states and maintained a sales office with a permanent stock of goods in Massachusetts. About half the sales from the Massachusetts office were to customers in Massachusetts, and the other half to customers outside.

The Court sustained the tax in both cases. The opinion was given by Day, J., and three judges dissented. The opinion contains the following important steps. First, it says that the Massachusetts Court had decided that the statute did not apply to corporations carrying on interstate commerce and intrastate commerce in such close connection that the latter could not be abandoned without seriously impairing the former. Second, it lays stress on the size of the Kansas tax and the permanent property of the Telegraph Company and permanent business of the Pullman Company in Kansas. Third, it says that in the present case the corporations carried on a local business quite separate from their interstate business. Fourth, it points out that on account of the surplus of both the corporations the taxes in question (of \$500 and \$200 respectively) were far from excessive. Fifth, it mentions the limit of \$2,000 upon the tax.

These steps in so far as they concern the amount of the tax

are clear, but as regards the connection between the local business and interstate business the ground for the distinction between the White case and the Pullman case is nowhere exactly stated.

In so far as the White case is concerned, the Court, in distinguishing it from the Pullman case, must have relied principally upon the amount of the tax and not upon the idea of the separability of the two classes of business, unless, indeed, on account of the construction given by the Court to the Massachusetts decisions it felt bound to assume that the Massachusetts Court had conclusively decided that the abandonment by the White Company of its local business in Massachusetts would not seriously impair its interstate commerce, even through financial pressure.

#### F. *Kansas City, etc., Ry. v. Kansas.*

The next case is that of *Kansas City, Fort Scott and Memphis Ry. Co. v. Kansas*, 240 U. S. 227 (1916). This case concerned a railway incorporated in Kansas and subjected to an annual excise tax which amounted to approximately one-twentieth of 1 per cent., but had a maximum limit of \$2,500. In sustaining the tax the Court distinguished the Western Union case principally on the ground that the tax in that case was upon the total capital stock, and made the following comment upon the Baltic case.

(Page 234.) "And, in the case of *Baltic Mining Co. v. Massachusetts*, supra, where a tax on foreign corporations was measured by the authorized capital stock and was limited to \$2,000, the court also reached the conclusion 'that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce,' and that hence the legislation was within the authority of the State. It is true that in that case it was pointed out that the taxing act did not apply to corporations engaged in railroad, telegraph, etc., business, or to those corporations whose business is interstate

'commerce; but it was also distinctly stated that the products of the corporations before the court were 'sold and shipped in interstate commerce,' and that to that extent they were 'engaged in the business of carrying on interstate commerce' and were 'entitled to the protection of the Federal Constitution against laws burdening commerce of that character.' It was because the tax, although measured by authorized capital stock, could not in view of its limitations be regarded as imposing a direct burden upon interstate commerce that the tax was upheld. 231 U. S. pp. 68, 86, 87."

This comment upon the *Baltic* case made in a unanimous decision and in an opinion by Hughes, J., who concurred in the opinion in the *Baltic* case, is entitled to great weight. It finally eliminates the possibility of considering that the *Baltic* case can be supported on the ground that only in the case of a public carrier is there such connection between interstate and intrastate commerce as to render an undue burden upon the latter unconstitutional.

G. *Kansas City, etc., Ry. v. Stiles*, 242 U. S. 111 (1916).

This case concerned a railway which was consolidated under the laws of three states, including Alabama. Alabama levied an annual franchise tax upon it, measured by the total capital, but at varying rates, according to the amount of the capital. The tax in question was about \$2,400 on a capital of about \$6,000,000. It appeared that somewhat less than one-half of the capital represented capital of the original Alabama corporation.

The Court, after considering the fact that the corporation, by accepting the terms of the consolidation statutes of Alabama, agreed to be bound by the terms of Alabama laws, so far as they were constitutional, distinguished the *Western Union* case on the following ground:—

"The tax is not of the character condemned in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1,

and kindred cases. In the latter case, a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the State. Under the circumstances therein disclosed and the character of the business involved, this court held that the statute was in substance an attempt to tax the right to do interstate business, and to tax property beyond the confines of the State, and was therefore void. Here, a franchise tax is levied upon a corporation consolidated under the laws of the State by its own acceptance of that law in incorporating under it."

It is quite clear that within the terms of the above distinction, the International Paper Company is a foreign corporation engaged in interstate commerce and subjected to tax of large amount, and is not a corporation consolidated under the laws of Massachusetts and thereby accepting those laws.

As a matter of pure theory, the distinction between the case of *Kansas City, etc., Railway v. Stiles* and the cases of the Western Union Company and the Pullman Company may not be always very clear, but as a practical matter the distinction is well marked. Whether by incorporation or consolidation, it is exceedingly improbable that any one corporation would become incorporated under the laws of very many states; also, it is exceedingly improbable that a corporation would be incorporated under the laws of a state where a large percentage of its property was not located. For that reason, franchise taxes on domestic corporations, measured by the total capital stock, are not likely to be levied simultaneously by a large number of states on one corporation, and the franchise upon which they are levied is likely to represent a very large proportion of the total franchise value of the corporation. In the case of foreign corporation franchise taxes, the situation is entirely different. A single large corporation is very likely to desire to do business as a foreign corporation in a great many states. Its interstate commerce would be seriously

impaired if it could not do so. The value of its franchise in any one state into which it may go as a foreign corporation is very likely to represent a very small part of its total franchise value.

#### H. *Albert Pick Co. Case.*

In *Albert Pick Co. v. Jordan*, 244 U. S. 647 (1917), a case arose of a corporation having little or no permanent property in California desiring to do business therein without complying with two California statutes; the first, Section 409 of Political Code, referred to in the argument as the Filing Fee Act, and the second, Statutes of California, 1905, p. 493 as amended, referred to as the License Tax Act. The Filing Fee Act apparently imposed an initial tax, payable once, not annually, amounting to approximately \$100 per million dollars of capital stock. Before the argument, this act had been repealed and the principal argument was not concerned with it. The License Tax Act graded the taxes according to the total capital stock, but was subject to a maximum limit of \$250. This court sustained the taxes. The rate of the Filing Fee Act and the fact that it was payable only once, not annually, and the fact that Albert Pick Co. had no permanent property in California, distinguished the case of that statute clearly from the present case. The License Tax Act, being subject to a maximum limit of \$250, brought the case of that statute clearly within *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas* (supra, p. 16 of this brief). Since the total capital of the Pick Co. was only \$1,000,000, the taxes involved were only \$100 each.

#### I. *Summary of General Principles.*

The final effect therefore of the later decisions upon the three views originally advanced in the Western Union Case is as follows:—

(1) The views of the Court in that case have been affirmed if the decision is considered to be limited to cases where there is such connection between the interstate and local business that discontinuance of the local business would seriously impair the interstate business on account of economy of operation.

(2) Such connection may be found not only in the case of public carriers, but also in the case of trading companies.

*Kansas City, Fort Scott and Memphis Ry. Co. v. Kansas*, 240 U. S. 227.

(3) If there is permanent property in the state acquired before the imposition of the tax and especially adapted to carrying on both classes of business and not interstate commerce alone, the direct effect upon the interstate business of an undue burden imposed upon the intrastate business is more clear.

(4) If the tax, though measured by the total authorized capital, has a reasonable maximum limit, it does not sufficiently seriously affect the local business to lay an undue burden upon the interstate business. This rule is reached not by considering single cases in which the small tax may be a hardship, but by observing the general tendency.

*Baltic Mining Co. v. Massachusetts*, 231 U. S. 68.  
*Kansas City, Fort Scott and Memphis Ry. Co. v. Kansas*, 240 U. S. 227.

(5) The case of a franchise tax upon a domestic corporation or domestic franchise is to be distinguished.

*Kansas City, etc., Ry. v. Stiles*, 242 U. S. 111.

## 2. APPLICATION OF THE ABOVE PRINCIPLES TO THE CASE OF THE INTERNATIONAL PAPER COMPANY.

### A. *The Tax.*

The tax in the present case cannot be regarded as sufficiently different from that in the Western Union and Pullman cases to lead to a different conclusion as to its validity. Under the Massachusetts Statute of 1909 the petitioner was subjected to a tax of one-fiftieth of 1 per cent., the tax being limited to \$2,000; under the Statute of 1914 (c. 724) the petitioner was, in addition, subjected to a tax of one-hundredth of 1 per cent. upon its capital in excess of ten million dollars (\$10,000,000). The total tax actually paid amounted to \$5,500. The measure of the tax—the total authorized capitalization—is exactly like that of the Kansas statute. The rate of the Kansas tax was about twice the rate of the present tax, but the Kansas tax was to be paid only once—upon qualifying in the state—while the present tax if sustained will be imposed annually—not simply once. It is therefore a much heavier tax than the Kansas tax.

It is true that \$2,000 of the present tax was levied under the same statute in question in the Baltic case. Even that part of the tax is of course much larger than the tax of \$500 on the Baltic Company and of \$200 on the White Company which were previously considered. The remainder of the tax, however, was measured strictly by the total capital stock of the petitioner without any maximum limit. For larger corporations the remaining part of the tax would be correspondingly higher. This unlimited tax differentiates the present case absolutely from the Baltic case and also from the cases of *Kansas City, etc., Ry. Co. v. Kansas*, and *Albert Pick Co. v. Jordan*, previously referred to.

Furthermore, the capital stock of the petitioner in this case represents largely property outside the state and em-

ployed in connection with interstate commerce. It appears from the Agreed Facts that the petitioner operated twenty-two manufacturing plants outside Massachusetts. The exact value of these plants does not appear, but it is stated in the Agreed Facts that the total assets of the petitioner (whether net or gross is not stated) amount to not less than forty million dollars (\$40,000,000), of which less than 2 per cent. are located in Massachusetts. Also it is fairly to be assumed that a large part of the business of the petitioner from which its income is derived is interstate commerce. It is true that figures with regard to this point do not appear in the Agreed Facts, but such is certainly the case with regard to most of the large mercantile companies of to-day. And if the sales through the Massachusetts office are a fair example of all the sales of the petitioner, 86 per cent. of the total sales constituted interstate commerce. If the decision of the present case should turn upon the lack of proof of the general interstate business of the petitioner, it should be explicitly rested upon that ground, since in the case of other large corporations the general interstate business could undoubtedly be shown. The case is not like *Kansas City, etc., Ry. v. Stiles* for the reasons stated in analyzing that case on p. 17 of this Brief.

Finally, it cannot be urged with regard to this company, as it was with regard to the Baltic and White companies, that the total par value of the authorized capital stock is so much less than the assets of the corporation that a tax based upon the total par value of the authorized stock bears no relation to the real assets of the corporation. From the Agreed Facts it appears that the property of the petitioner in Massachusetts is worth about five hundred thousand dollars (\$500,000) and that this property is not more than  $1\frac{3}{4}$  per cent. of the total assets of the company. Upon that basis the total assets of the company would be about thirty million dollars (\$30,000,000). It is stated in the Agreed Facts that the total assets amount to not less than forty million dollars (\$40,000,000), and it is to be inferred

that that sum is to be reached by taking into account a certain amount of good-will and intangible assets. Upon no reasonable assumption, however, can it be supposed that the petitioner has a large surplus in any way equivalent to the surplus of the White Company and the Baltic Company.

### B. *Relation between Petitioner's Local and Interstate Business.*

In respect of the relation between its local and interstate business the case of the petitioner is in some respects very different from those of the Western Union and Pullman Companies, and for that reason it must be considered carefully. In this discussion it will be assumed that there is no peculiar immunity attaching to public service companies, and that the real question is just how far the prohibition or undue taxation of the local business would affect the economical operation of the interstate business.

#### (1.) GENERAL DESCRIPTION OF THE MASSACHUSETTS BUSINESS.

The local business of the petitioner consisted partly in manufacturing paper and partly in selling through its Boston sales office part of the product of its Massachusetts plant to Massachusetts customers.

Its interstate business in Massachusetts consisted of sales of the following classes: (1) the sale through the Boston office of goods which were manufactured outside the state and were shipped from plants of the petitioner outside the state to purchasers in New England; (2) the sale of part of the products of the Massachusetts plant to customers outside Massachusetts. From the Agreed Facts it appears that these two classes of sales together constituted 86 per cent. of the total sales through the Boston office, the remaining 14 per cent. being sales to Massachu-

setts customers of goods manufactured at the Massachusetts plant.

It also appears from the Agreed Facts that the petitioner's Massachusetts plant was of a permanent and peculiar nature and had been acquired by the petitioner long before the enactment of any law in Massachusetts imposing a franchise tax on foreign corporations, and that at that time the petitioner had qualified to do business in Massachusetts and had never since surrendered or forfeited that privilege.

The petitioner owned twenty-two plants outside Massachusetts.

(2.) EFFECT UPON INTERSTATE BUSINESS OF BURDEN ON LOCAL BUSINESS.

The essential question to consider is: What would be the effect upon the petitioner's interstate business of an undue burden upon the petitioner's local business?

Consider first the local business at the sales office. Only 14 per cent. of the sales were of local or intrastate character. Very probably, therefore, the two salesmen who, according to the Agreed Facts, carried on the business of the petitioner at this office (together with their clerks) could have been employed for the sole purpose of making only the interstate sales. But the loss of the return from the local sales would have been sadly felt because that loss would cause no proportionate reduction in the overhead charges. The two salesmen's time would be occupied as before, the office rent would run as before, possibly one less clerk might be required.

In so far as the business at the sales office is concerned, the case is absolutely indistinguishable from the Pullman case. The petitioner's office equipment and employees, like the Pullman cars and porters, were used and occupied in carrying on both classes of business, and the discontinuance of the local business would simply operate to increase greatly the overhead charges of the interstate business, and a refusal to sell to local customers any of the products of the Massa-

chusetts plant would probably entail as much loss of goodwill as the refusal of the Telegraph Company or Pullman Company to do local business.

This aspect of the case is especially important because several of the large foreign corporations carrying on business in Massachusetts do so simply through a sales office and have no local manufacturing plant. If the present tax were levied solely on the privilege of doing the business done at the petitioner's sales office and carrying a stock of goods to supply it, the tax would plainly be an attempt to reach and burden interstate commerce.

In the second place consider the manufacturing business of the petitioner carried on at its Massachusetts plant. This business raises a situation which has not been before the United States Supreme Court. A similar case has been before the Massachusetts Court in *Keystone Watch Case Co. v. Commonwealth*, 212 Mass. 50 (1912). In that case it was decided that manufacturing was not interstate commerce, and that being separable from interstate commerce its taxation was entirely subject to state control.

In spite of the opinion in that case, it is believed that the true ground for the decision should have been the limit upon the tax involved and not the separability of manufacture from commerce.

Consider the practical situation to-day of a large manufacturing and commercial company like the petitioner, doing business throughout all or a large part of the country. It maintains plants in many places. These plants soon become specialized to a certain extent, and in their specialties cover all the territory covered by the company. Also the plants are so located that in general lines of goods, made at various plants, they can serve a number of states, and often the plants are made large enough so that they may not only supply the demand in the territory adjacent to them, but also contribute, in good times, towards supplying the demand elsewhere. The local plant becomes an essential link in the interstate business of a large com-

pany, and the interstate business is the chief source of income upon which the company lives. Its entire output cannot be marketed readily either entirely outside or entirely inside of the state when it is established. It would be a great inconvenience and expense to require domestic corporations to carry on all the local business of such a company.

The Agreed Facts do not state the exact situation of the petitioner's Massachusetts plant in this regard, but certainly some of the above facts are to be inferred, and they would exist in the case of other large foreign corporations doing business in Massachusetts. If the decision of the present case should depend upon lack of proof of any of such facts, it should clearly be rested upon that special ground.

Granted, therefore, for the sake of argument, that manufacture is not interstate commerce, why should that fact distinguish the case of a large company operating through many states from the *Western Union* and *Pullman* cases? Intrastate transportation is not interstate commerce, and intrastate transportation should be subject to state control to exactly the same extent as manufacture, no more and no less. It is not to be assumed that an interstate carrier is by law compelled to take local passengers unless it ceases its interstate business in the state. See *Pullman Co. v. Adams*, 189 U. S. 420. In theory and as a matter of book-keeping, local and interstate transportation as well as local and interstate commerce of other kinds are entirely separable. As a practical matter both may be connected. If the petitioner's local manufactures in Massachusetts were stopped, the effect upon its interstate commerce would be vital. Until the plant could be replaced in some other state, the customers in other states usually supplied with goods from the petitioner's Massachusetts plant either could be supplied by the petitioner with great extra expense or not at all. Furthermore, the petitioner would suffer a loss, through closing its Massachusetts plant, prob-

ably much greater than that which would have fallen upon the Western Union Company from ceasing to use certain of its equipment upon local business, and this loss would have to be borne by the whole business of the petitioner. Even if it be said that the sale of a part of the product of the Massachusetts plant to Massachusetts customers makes a part of the local manufacture entirely a separate matter, the difficulty would not be removed. To prevent the local sales of the product of the Massachusetts plant would increase the financial burden of its interstate business in exactly the same manner as the termination of the local business of the Pullman Company would bear upon its interstate business.

It may be, as stated in the *Keystone* case, that the factory of a large company is not necessary for its interstate business if the word "necessary" be used in the sense of "absolutely essential regardless of economic results," but a cessation of the operation of its plant would have exactly as real, immediate and vital effect upon its interstate commerce as the termination of the local business of the Western Union Company or the Pullman Company. Any other conclusion must rest upon the distinction, in theory, between commerce and manufacture, and disregard the real financial burden involved.

The opinion in the *Keystone* case cites the case of *Kidd v. Pearson*, 128 U. S. 1, which sustained a state statute forbidding the manufacture of intoxicating liquors. To-day it is recognized that such a statute may be fully sustained as an exercise of police power.

## PART III.

EFFECT OF THE EQUAL PROTECTION OF LAWS  
CLAUSE.

The leading decision upon the authority of which the tax in this case is to be regarded as depriving the petitioner of the equal protection of the laws is *Southern Railway Co. v. Greene*, 216 U. S. 400 (1910). In that case a statute of Alabama imposed upon foreign corporations doing business in the state an annual tax of substantially one-tenth of 1 per cent. on capital employed in the state. The tax was held to be unconstitutional as applied to the Southern Railway, because the Railway had acquired permanent lines of railway in Alabama before the imposition of the tax and had entered the state to do business therein in compliance with Alabama law, and because the Railway had paid many other taxes imposed by Alabama which corresponded to taxes imposed upon domestic railways, and this tax represented an additional tax to which domestic railways were not subject. The tax amounted to \$22,458.33.

The two important questions which must be decided in order to bring this case within the principle of the *Greene* case are:—

(1) Was the property of the petitioner in Massachusetts of a permanent character comparable to that of the Southern Railway? and

(2) Was the statute in the present case a clear discrimination against foreign corporations?

## I. PROPERTY OF THE PETITIONER IN MASSACHUSETTS.

From the Agreed Facts it clearly appears that the plant of the petitioner in Massachusetts was acquired by it in the year 1898 and that the petitioner at that time qualified

to do business in Massachusetts and has never since forfeited or lost that privilege. It furthermore appears that a paper mill requires for its operation a plant, water-power, buildings and special machinery and appliances of special nature and construction, much of which is of no use in any other kind of business than that of paper manufacturing. It is clearly inferable from the Agreed Facts that this statement was intended to apply to the petitioner's plant in Massachusetts. It also appears from the Agreed Facts that there would be a substantial loss through closing the plant unless it could be sold to another paper manufacturer as a going concern. The plant was taxed for nearly \$500,000.

It is, of course, true that the amount of this permanent property within the state does not equal the amount of the permanent property of the Southern Railway which was in Alabama. Nevertheless, it has all the characteristics of permanent property which were referred to in the opinion in the *Greene* case. It is both fixed and permanent. It cannot be withdrawn at the pleasure of the investor like a stage or a steamboat. It must stay as a permanent investment in order that its value may not be destroyed.

It is true that if a paper manufacturer could be found who would buy the plant it might be sold for its actual value; but this fact is no ground for distinguishing this case from the *Greene* case. It would have been equally true there that another railroad corporation might have taken over at a fair value the Southern Railway's property in Alabama.

None of the later cases already referred to in this brief presents the case of a corporation having anything like the permanent property of the petitioner in this case. In the *White* case some reliance was placed upon the doctrine of *Southern Railway Co. v. Greene*, but that company had only a leased building, which could be used for almost any purpose. In that respect the *White* case was clearly distinguishable from the *Greene* case, and upon that ground only it was distinguished from the *Greene* case by the

Supreme Court of the United States in the opinion already referred to.

The Keystone Watch Case Company, as appears from the Agreed Facts in the Keystone case, had not acquired its property before the enactment of the law imposing the tax in question in that case. If the decision upon this point should turn upon the small amount or transient character of the property in Massachusetts, it should be made expressly to rest upon that ground, since other large corporations doing business in Massachusetts undoubtedly own in Massachusetts a great deal more property than the petitioner, which, partly on account of its character,—and certainly on account of its size,—would be even more difficult to sell.

## 2. THE DISCRIMINATORY NATURE OF THIS TAX.

The question of whether or not the tax in the present case discriminates between foreign and domestic corporations is not as easily decided as it was in the Greene case. It is true that the tax in the present case is far larger in proportion to the property of the petitioner in Massachusetts than was the tax in the Greene case. In that case the tax was \$22,000, and since it was substantially at the rate of one-tenth of 1 per cent., it is to be inferred that the property of the petitioner in Alabama was about twenty-two million dollars (\$22,000,000).

In this case the property of the petitioner in Massachusetts was about five hundred thousand dollars (\$500,000) and the tax was \$5,500. Even if the general tendency—rather than a specific case—should be considered, it would be apparent that in these days of large corporations a tax of one-fiftieth of 1 per cent. upon the first ten million dollars (\$10,000,000) of capital and one one-hundredth of 1 per cent. on the balance of the capital would in most cases exceed the tax of one-tenth of 1 per cent. upon the property within the state.

The difficulty arises not in the amount of the tax, but in comparing the Massachusetts taxes upon domestic corporations with those upon foreign corporations. These taxes at present are assessed upon a basis so different that no exact comparison is possible. In this case the petitioner has endeavored to show that the franchise tax upon it would be much less if its Massachusetts property were held by a separate Massachusetts corporation, and the Commonwealth has sought to show that the tax upon the petitioner would be much greater if all its property were held by a Massachusetts corporation. These two comparisons lead to very different results, and the question is which one—if either of them—should be adopted in order to determine whether in the general run of cases and not in a specific instance there would be any discrimination.

In comparing the Massachusetts taxation to which domestic corporations and foreign corporations are now subject, we find that the land and machinery of both corporations are taxed exactly the same. We next find that the merchandise and tangible personal property of foreign corporations are subject to local taxation, whereas those of domestic corporations are not. Instead of a tax upon personal property the domestic corporation pays a franchise tax. In the general case this franchise tax is found by taking the total value of the shares and deducting the value of land and machinery in Massachusetts, tangible property taxable outside Massachusetts and non-taxable securities. The result of this computation is in general to tax a domestic corporation upon the value of its tangible personal property in Massachusetts and its intangible property after deducting the amount of its debts.

It therefore appears that in general the franchise tax upon the domestic corporation reaches its tangible personal property in Massachusetts as well as all its intangible property and allows a deduction for debts, whereas the local taxation upon a foreign corporation taxes its tangible personal property in Massachusetts without allowing any deduction for

debts. The difference between the two taxes is entirely in favor of the domestic corporation since the intangible assets of the domestic corporation are located for taxation in Massachusetts, whereas the corresponding assets of a foreign corporation are not located for taxation in Massachusetts and are presumably subject to taxation elsewhere.

The above general rule cannot be followed out in every case because of maximum and minimum limits upon the Massachusetts domestic corporation franchise tax. The minimum limit is made the difference between one-tenth of 1 per cent. upon the total actual value of the capital stock and all local taxes paid upon real estate and machinery. Since the local tax rate is generally nearly 2 per cent., in a great many cases the minimum franchise tax is far from being equal to one-tenth of 1 per cent. upon the total actual value of the capital stock.

It is evident, therefore, that the Massachusetts foreign corporation franchise tax is not intended to be a substitute for the domestic corporation franchise tax (since in the case of foreign corporations the tax upon the local tangible personal property in the state takes the place of the domestic franchise tax), but rather is an additional and special tax imposed upon foreign corporations for the privilege of doing business in Massachusetts and should be limited to a reasonable excise upon that privilege as a separate and distinct subject for taxation.

In the *Greene* case it was clearly held that it was not a reasonable classification to subject foreign corporations to the privilege tax there involved, and for the reasons stated in that opinion the Massachusetts statute should not be regarded as a proper tax upon a separately classified privilege. A paragraph from the opinion in the *Greene* case precisely covering this question of classification expressly decides this point as follows:—

(See 216 U. S. at page 417.)

“It remains to consider the argument made on behalf of the State of Alabama, that the statute is justi-

fied as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the State is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the State. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155, 165; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559."

The tax imposed by the Statute of 1914, which is not subject to the maximum limit of \$2,000 per annum, and which may therefore amount to a very substantial tax, is—far more clearly than the tax under the Statute of 1909—a discrimination against foreign corporations and therefore, in its application to the petitioner, unconstitutional under the doctrine of the *Greene* case. Upon this aspect of the case the Argument in Part IV of this Brief, immediately following, has a direct bearing.

## PART IV.

### EFFECT OF THE DUE PROCESS OF LAW CLAUSE.

The question of the unreasonableness of the present tax may arise under the Due Process of Law Clause of the fourteenth Amendment of the Constitution of the United States. The decision in the *Western Union* case, which has already been fully discussed, undoubtedly relied principally upon the effect of the Kansas statute upon interstate commerce, but nevertheless it was made a distinctly separate ground for that decision that the statute in question was not in accord with the constitutional requirement of due process of law. This appears from the following statement in the Opinion of the Court, 216 U. S. at page 47:—

“The state court ought to have refused the affirmative relief asked and dismissed the petition upon the ground that the condition sought to be enforced by a decree of ouster was in violation of the commerce and due process clauses of the Constitution and of the company's rights under that instrument.”

The only ground for considering the Kansas statute or the present statute as a failure of due process of law is that such a statute is so unreasonable a tax upon the privilege of doing local business that its form must be disregarded and that therefore in true effect it will be found to be a tax upon interstate commerce and property outside the state.

The unreasonableness arises simply from the fact that the tax is proportionate to the total capital, representing as it does property outside Massachusetts and employed in interstate commerce. In the *Western Union* case that point alone was deemed sufficient, without considering the exact relation between the tax and the profits from local business in that case. However, even if that relation were

considered as far as is possible in this case, the tax would not appear reasonable. The Massachusetts plant and merchandise of the petitioner were assessed for less than \$500,000. If the earnings from all the Massachusetts business should average 10 per cent. of that amount per year they would be only \$50,000. The tax of more than \$5,000 would then be more than 10 per cent. of the earnings. If the reasonableness of the tax is to be tested by the relation of the tax to the income of the sales office (86 per cent. of the sales being interstate sales) then it at once must be admitted that the tax is really to come out of interstate commerce and be a burden on it.

All these grounds for finding the excise unreasonable apply with far greater force to the tax under the Statute of 1914 than to the tax under the Statute of 1909, because in any given case the tax under the Statute of 1914 may be many times larger than the former tax without any change in the actual privilege exercised under the laws of Massachusetts. The amount of the tax in this case is not immaterial, for while it is possible that under our Massachusetts laws a small excise tax upon foreign corporations might not be considered to discriminate between those corporations and domestic corporations which are now subject to a different kind of franchise tax, a very much larger excise tax upon foreign corporations would be discriminatory and therefore unreasonable, since the difference between the franchise granted to a domestic corporation and the privilege granted to a foreign corporation to come into the state is not sufficiently great to justify radically different excise taxes. Upon this point the quotation already made from the *Greene* case, on page 32 of the Brief, is exactly in point, and the quotation from the *White* case, in the Massachusetts court, is so apt that it is repeated here. (See 212 Mass. 35 at page 44.)

"This (the maximum excise of \$2,000) is in itself a reasonable sum. It does not exceed the amount which may be charged for an annual license to sell intoxicating

liquors. A flat rate of \$2,000 might have been charged all foreign business corporations without violation of any right guaranteed by the Constitution of the United States. The present statute graduates the fee down from that maximum. That in this regard it imposes a diminished burden upon the smaller corporation is not fatal. The gauge of this reduction is not the value of the property of the corporation, nor the actual value of its shares, but the par value of its capital stock. This fact, in conjunction with the comparatively small maximum established, is another indication that the excise cannot be a property tax."

### CONCLUSION.

In conclusion the Amicus Curiae is of opinion that the Statute of 1914, chapter 724, in so far as it applies to International Paper Company is unconstitutional upon the following grounds:—

*First.* Because in view of the large amount of property of the petitioner outside Massachusetts and its general interstate commerce, the tax in question, upon the total capital stock representing all such property and business, is excessive in reference to the privilege of doing local business and therefore on account of the close economic connection between the local business of the petitioner and its interstate commerce carried on in Massachusetts and elsewhere, the tax in question is a burden on the interstate commerce of the petitioner.

*Second.* Because having regard to the general effect of the Massachusetts franchise taxes upon domestic corporations the tax under the Statute of 1914 upon foreign corporations is discriminatory and therefore the petitioner, which before the enactment of the statute had acquired in Massachusetts a large amount of permanent property, especially adapted to a peculiar use, was by the imposition of the tax deprived of the equal protection of the laws.

*Third.* Because the tax levied under the Statute of 1914

was unreasonable both on account of the fact of its inequality as applied to different foreign corporations carrying on the same business in Massachusetts and on account of the fact that it discriminated between foreign corporations and domestic corporations carrying on the same business, and that therefore the tax in question was not a reasonable excise and in effect taxed property outside the state so that it was not in accordance with due process of law.

Respectfully submitted,

MALCOLM DONALD,

*Amicus Curiae.*



Supreme Court of the United States

No. 733

OCTOBER TERM, 1917

INTERNATIONAL PAPER COMPANY

PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS

In Error to the Supreme Judicial Court of Massachusetts

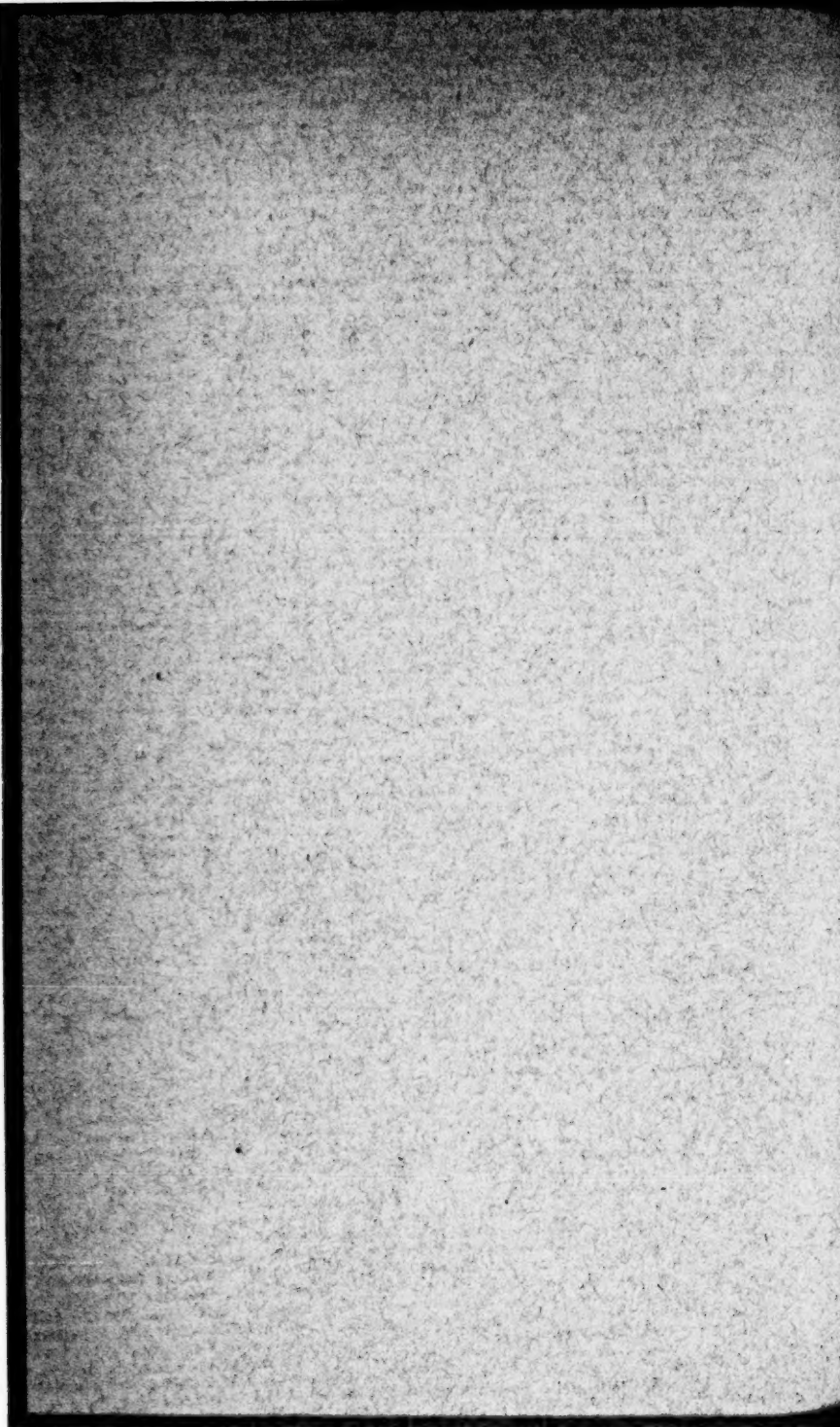
BRIEF FOR DEFENDANT IN ERROR

HENRY C. ATTWILL

*Attorney-General for the Commonwealth  
of Massachusetts*

WM. HAROLD HITCHCOCK

*Assistant Attorney-General*



**Supreme Court of the United States**

OCTOBER TERM, 1917

No.

---

**INTERNATIONAL PAPER COMPANY**

**PLAINTIFF IN ERROR,**

**v.**

**COMMONWEALTH OF MASSACHUSETTS**

---

In Error to the Supreme Judicial Court of Massachusetts

---

***BRIEF FOR DEFENDANT IN ERROR***

---

**HENRY C. ATTWILL**

*Attorney-General for the Commonwealth  
of Massachusetts*

**WM. HAROLD HITCHCOCK**

*Assistant Attorney-General*



## SUBJECT INDEX.

	PAGE
Statement of Case, . . . . .	1
Statutes:	
For the Taxation of Foreign Corporations, . . . . .	4
For the Taxation of Domestic Corporations, . . . . .	7
Argument.	
I. Present Status of Massachusetts Foreign Corporation Excise Tax, . . . . .	9
II. The Petitioner was subject to the Original \$2,000 Ex- cise Tax, . . . . .	12
III. Real Question presented by the Record, . . . . .	14
IV. General Scheme of 1914 Statute Valid, . . . . .	15
V. The Additional Tax imposed upon the Petitioner by the Statute of 1914 does not upon the Particular Facts of this Case have the Necessary Effect of burdening its Interstate Commerce, . . . . .	25
VI. The Tax in Question does not deny to the Petitioner the Equal Protection of the Laws, . . . . .	27
1. It has acquired no Permanent Property within the State, . . . . .	28
2. There has been no Discrimination against the Peti- tioner in the Increase of its Tax, . . . . .	29
VII. Conclusion, . . . . .	31



## LIST OF CASES CITED.

	PAGE
Albert Pick & Co. v. Jordan, 169 Cal. 1, . . . . .	21
Allen v. Pullman Co., 191 U. S. 171, . . . . .	22, 24
Attorney-General v. Electric Storage Battery Co., 188 Mass. 239, . . . . .	10
Baltic Mining Co. v. Commonwealth, 207 Mass. 381, . . . . .	10, 13, 21
Baltic Mining Co. v. Massachusetts, 231 U. S. 68, . . . . .	10, 12, 15, 23
Case of the State Freight Tax, 15 Wall. 232, . . . . .	23
Cheney Brothers Co. v. Commonwealth, 218 Mass. 566, . . . . .	24, 28, 29
Cornell v. Coyne, 192 U. S. 418, . . . . .	13
Dobbins v. Commissioners of Erie County, 16 Pet. 435, . . . . .	23
Flint v. Stone-Tracy Co., 220 U. S. 107, . . . . .	21
Hamilton Co. v. Massachusetts, 6 Wall. 632, . . . . .	21
Horn Silver Mining Co. v. New York, 143 U. S. 305, . . . . .	17, 18
H. K. Mulford Co. v. Curry, 163 Cal. 276, . . . . .	20
Kansas City Ry. Co. v. Kansas, 240 U. S. 227, . . . . .	18, 21
Kansas City, etc., R.R. Co. v. Stiles, 242 U. S. 111, . . . . .	20
Keystone Watch Case Co. v. Commonwealth, 212 Mass. 50, . . . . .	13
Kidd v. Person, 128 U. S. 1, . . . . .	13
Marconi Wireless Telegraph Co. v. Commonwealth, 218 Mass. 558, . . . . .	10
McCulloch v. Maryland, 4 Wheat. 316, 431, . . . . .	23
Osborne v. United States Bank, 9 Wheat. 738, . . . . .	23
Pembina Consolidated Silver Mining & Milling Co. v. Pennsylv- ania, 125 U. S. 181, . . . . .	17
Pick & Co. v. Jordan, 244 U. S. 647, . . . . .	21
Pullman Co. v. Adams, 189 U. S. 420, . . . . .	22, 24
Pullman Co. v. Kansas, 216 U. S. 56, . . . . .	23
S. S. White Dental Mfg. Co. v. Commonwealth, 212 Mass. 35, . . . . .	10
Society for Savings v. Coite, 6 Wall. 594, . . . . .	21
Southern Railway Co. v. Greene, 216 U. S. 400, . . . . .	27, 31
The Collector v. Day, 11 Wall. 113, . . . . .	23
United States v. E. C. Knight Co., 156 U. S. 1, . . . . .	13
United States Express Co. v. Minnesota, 223 U. S. 335, . . . . .	22
Van Allen v. The Assessors, 3 Wall. 573, . . . . .	23
Western Union Tel. Co. v. Kansas, 216 U. S. 1, . . . . .	20



# Supreme Court of the United States.

October Term, 1917.

No.

---

INTERNATIONAL PAPER COMPANY, PLAINTIFF IN ERROR,

*v.*

COMMONWEALTH OF MASSACHUSETTS.

---

IN ERROR TO THE SUPREME JUDICIAL COURT OF  
MASSACHUSETTS.

---

*BRIEF FOR DEFENDANT IN ERROR.*

---

## STATEMENT OF CASE.

This is a writ of error brought to reverse a decree entered by the Supreme Judicial Court of Massachusetts on September 25, 1917, in accordance with a rescript from the full court, dismissing the petition of the plaintiff in error to recover the amount of two foreign corporation excise taxes paid by it to the Commonwealth of Massachusetts on May 11, 1915. The assignments in error present in different forms

the claim that the tax or taxes in question were imposed in violation of the "commerce clause" of the Federal Constitution and of the "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment. The plaintiff in error will be referred to in this brief as the petitioner.

The authorized capital stock of the petitioner is \$45,000,000, of which between \$39,000,000 and \$40,000,000 has been issued and is outstanding. Its charter confers authority "to maintain, conduct and manage in the State of New York and elsewhere the business of manufacturing, producing, selling and dealing in all kinds of paper." It maintains and operates twenty-three paper mills or plants connected with the manufacture of paper, chiefly located in New York, Vermont, New Hampshire and Maine. At Montague in Massachusetts it owns and operates a paper mill comprising real estate, water power, machinery and personal property, where it manufactures paper for sale in Massachusetts and also in other states of this country. The petitioner maintains a selling office at Boston, with bookkeeping and clerical force, where sales and contracts of sale both within and without this state are made by two salesmen subject to approval by employees of the petitioner at its main office in New York. About eighty-six per cent of sales and contracts negotiated and made through its Boston office or for execution in Massachusetts require or contemplate the transportation and delivery of goods from a mill located outside Massachusetts to purchasers in Massachusetts or from its Massachusetts mill to purchasers outside Massachusetts; and about fourteen per cent. of such

sales and contracts relate to goods to be delivered to a Massachusetts purchaser from its Massachusetts mill. No stock of goods is kept on hand in Massachusetts from which sales are made deliverable, the contracts being largely on long terms for the entire supply of paper required for newspapers, but the petitioner aims to have on hand at its mills and in transit ample stock to supply the needs of its customers.

Between 1903 and 1907 the petitioner made additions and improvements to its plant in Montague at a cost of more than \$26,000. No part of these additions and improvements could be abandoned or sold for other uses than those of a paper mill except at a substantial loss to the petitioner. If it went out of business and desired to dispose of its plant, it could obtain the full market value for it, provided it was able to obtain a customer who desired to make use of it in the manufacture of paper. If it could not obtain such a customer, it is probable that the petitioner could dispose of its plant only at a substantial loss from its market value as a paper manufacturing plant.

The rate of taxation on property in the town of Montague for the year 1915 was \$17.20 per thousand. The rate of the franchise tax on domestic corporations for the year 1915, determined as provided in St. 1909, c. 490, part III, § 43, was \$18.55 per thousand. The petitioner's plant in Montague was assessed by that town in 1915 for the purpose of local taxation at \$472,000 and in that year it paid a tax to the town of \$8,118.

In 1915 the petitioner was required to pay to the Commonwealth excise taxes amounting to \$5,500,

of which amount \$2,000 was assessed under St. 1909, c. 490, Part III, § 56 and \$3,500 under St. 1914, c. 724. The petitioner seasonably filed its petition for abatement, which was dismissed by the Supreme Judicial Court as above stated.

#### STATUTES.

The provisions of the Massachusetts tax statutes so far as material to this case are as follows: —

#### FOR THE TAXATION OF FOREIGN CORPORATIONS.

*St. 1909, c. 490, Part III., § 39.*

"The term 'domestic business corporation' as used in this act shall mean every corporation of the classes enumerated in section one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three; the term 'foreign corporation' shall mean every corporation, association or organization of the classes enumerated in section fifty-eight of said chapter."

[*St. 1903, c. 437, § 58.*

"Every such foreign corporation (that is, every corporation established under laws other than those of the commonwealth, having a capital stock and established for the purpose of carrying on business for profit, but excluding the telegraph, railroad and other companies not included by the statute, and others covered by distinct provisions; see §§ 56, 7, 1) which has a usual place of business in this commonwealth, or which is engaged in this commonwealth, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, shall, before doing business in this commonwealth, in writing appoint the commissioner of corporations and his successor in office to be its true

and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on it, and that the authority shall continue in force so long as any liability remains outstanding against it in this commonwealth. The power of attorney and a copy of the vote authorizing its execution, duly certified and authenticated, shall, upon payment of the fee hereinafter provided, be filed in the office of the commissioner, and copies certified by him shall be sufficient evidence thereof. Service of such process shall be made by leaving a copy of the process and a fee of two dollars in the hands or in the office of the commissioner, and such service shall be sufficient service upon the corporation.”]

*St. 1909, c. 490, Part III., §§ 54, 55, and 56.*

“SECTION 54. *Every foreign corporation shall annually, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the secretary of the commonwealth, upon payment of the fee provided in section ninety-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, a certificate signed and sworn to by its president, treasurer, and by a majority of its board of directors, showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than ninety days prior to said annual meeting, in such form as is required of domestic business corporations under the provisions of section forty-five of said chapter, and the change or changes, if any, in the other particulars included in the certificate required by section sixty of said chapter, made since the filing of said certificate or of the last annual report.*

SECTION 55. A certificate which is required to be filed by the preceding section shall be accompanied by a written statement under oath by an auditor, as provided in section forty-seven of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, except that such auditor shall in all cases be chosen by the board of directors. Before it is filed it shall be submitted to the commissioner of corporations, who shall examine said certificate and shall as tax commissioner assess upon the corporation an excise tax in accordance with the provisions of the following section. If he finds that the certificate is in compliance with the requirements of the preceding section, he shall indorse his approval thereon; but no certificate shall be filed until he has indorsed his approval thereon, and until the excise tax required by the following section has been paid to the treasurer and receiver-general.

**Original  
tax.**

SECTION 56. *Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver-general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars.*

There follow certain provisions for the enforcement of payment of this tax and for the recovery of taxes illegally assessed, which are set out in the original brief of the Commonwealth (pp. 5, 6) in No. 12. They are not material here.

*St. 1914, c. 724, §§ 1 and 2.*

**New tax.**

"SECTION 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and

nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition.

SECTION 2. All laws now or hereafter in force relating to the assessment and collection of the tax imposed by said section fifty-six and all laws providing for appeal from any assessment made under said section fifty-six or for the recovery of any tax assessed thereunder shall, except so far as they are inconsistent with the provisions of this act, apply to the tax imposed by this act.

#### FOR THE TAXATION OF DOMESTIC CORPORATIONS.

*St. 1909, c. 490, Part III, §§ 40, 41, and 43.*

"SECTION 40. Every corporation organized under the general or special laws of the commonwealth for purposes of business or profit, having a capital stock divided into shares, except banks, whose shares are otherwise taxable under the provisions of this part, in addition to all returns required by its charter, and in addition to all returns otherwise required under the provisions of this part, shall annually, between the first and tenth days of April, make a return to the tax commissioner, under oath of its treasurer, stating the name of the corporation, its place of business, and setting forth as of the first day of April of the year in which the return is made: —

(Certain specified facts as to its property and financial condition.)

"SECTION 41. *The tax commissioner shall ascertain from the returns or otherwise the true market value of the shares of each corporation subject to the requirements of the preceding sec-*

tion, and shall estimate therefrom the fair cash value of all of said shares constituting its capital stock on the preceding first day of April, which, unless by the charter of a corporation a different method of ascertaining such value is provided, shall, for the purposes of this part, be taken as the true value of its corporate franchise. From such value there shall be deducted:

Third, In case of a domestic business corporation, the value of the works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, and of securities which if owned by a natural person resident in this commonwealth would not be liable to taxation; also the value of its property situated in another state or country and subject to taxation therein. There shall not be deducted the value of securities which if owned by a natural person resident in this commonwealth would be liable to taxation; and the tax commissioner in determining for the purposes of taxation the value of the corporate franchise of any such corporation shall not take into consideration any debts of such corporation unless the returns required from it contain a statement duly signed and sworn to, setting forth that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it.

SECTION 43. Every corporation subject to the provisions of section forty shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section forty-one, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid, the annual rate to be determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same year, as returned by the assessors of the several cities and towns under the provisions of section ninety-three of Part I, after deducting therefrom the amount of tax assessed upon polls for the preceding year, as

certified to the tax commissioner, upon the aggregate valuation of all cities and towns for the preceding year, as returned under sections fifty-nine and sixty of Part I; but the said tax upon the value of the corporate franchise of a domestic business corporation, after making the deductions provided for in section forty-one, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this commonwealth would be liable to taxation; *and the total amount of tax to be paid by such corporation in any year upon its property locally taxed in this commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner.* If the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town for the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination."

## ARGUMENT.

### I.

#### PRESENT STATUS OF MASSACHUSETTS FOREIGN CORPORATION EXCISE TAX.

By St. 1909, c. 490, Part III, § 56 (*supra* p. 6), which has been in force in substantially its present form since the enactment of St. 1903, c. 437, an excise tax is annually imposed by the Commonwealth upon all ordinary business foreign corporations engaged in business therein amounting to one-fiftieth of

one per cent. of the par value of its authorized capital stock, the amount of such tax not in any year to exceed \$2,000. This statute is construed by the State court as being an excise levied for the privilege of conducting a domestic business within the State and as not being applicable to corporations engaged solely in interstate commerce.

Attorney-General *v.* Electric Storage Battery Co., 188 Mass. 239.

Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381.

S. S. White Dental Mfg. Co. *v.* Commonwealth, 212 Mass. 35.

In *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, the general scheme of this tax was upheld by this court as a valid and constitutional exercise of the taxing power of the State, on the ground that it did not have the necessary effect of burdening interstate commerce or taxing property beyond the jurisdiction of the State. The court also held, on the facts of the two cases then before it, that the tax did not in fact impose a burden upon the interstate business of those corporations.

In *Marconi Wireless Telegraph Co. v. Commonwealth*, 218 Mass. 558, the Massachusetts court decided nine petitions for the abatement of taxes assessed under this statute, allowing two of them on the ground that the corporations in question were engaged in Massachusetts solely in interstate commerce, and dismissing the other seven on the ground

that each of those corporations was conducting a purely local business separable from its interstate commerce and thus subject to the tax in question for the privilege of engaging in that local business. These seven cases were brought to this court upon writ of error and are now pending under the name of No. 12, Cheney Brothers Company *et al. v.* Commonwealth of Massachusetts. They were originally argued on April 20, 1916, and in June last were restored to the docket for reargument. A motion is to be made to advance this case for argument together with No. 12.

A more complete statement of the history of the Massachusetts foreign corporation excise tax is set forth in the original brief of the Commonwealth in No. 12. (See p. 7.)

The taxes under litigation in No. 12 were assessed in 1913. The petitions for abatement were filed early in 1914 and the cases were argued before the full bench of the Massachusetts Supreme Judicial Court on March 23, 1914. Before they were decided St. 1914, c. 724, was enacted. This statute was approved and went into effect on July 1, 1914. It in substance provided that every foreign corporation subject to the tax just under discussion, namely, that imposed by St. 1909, c. 490, Part III, § 56, should at the same time that it paid that tax be required to pay an additional excise tax of one one hundredth of one per cent. of the par value of its authorized capital stock in excess of ten million dollars. The validity of this tax under the State and Federal Constitutions, both as a general scheme of taxation and in its appli-

cation to the particular business of this corporation, was fully sustained by the Massachusetts Supreme Judicial Court in the case at bar.

## II.

THE PETITIONER WAS SUBJECT TO THE ORIGINAL  
\$2,000 EXCISE TAX.

It seems plain that the petitioner is engaged in such a business in Massachusetts that it is subject to taxation by that State for the privilege of engaging in business therein.

It owns and operates a large plant for manufacturing paper of the assessed value of \$472,000. Here it manufactures paper which it sells both in Massachusetts and throughout the country. In addition it maintains in Boston a sales office from which its product is sold both in Massachusetts and elsewhere. The extent of the sales made by this office does not appear from the record, but it does appear that about fourteen per cent. thereof are for delivery of paper manufactured at the Massachusetts plant directly therefrom to Massachusetts customers.

There can be no question but that the operation of a large manufacturing plant of this character of itself constitutes "carrying on a purely local and domestic business quite separate from its interstate transactions." *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 86. Such a business is obviously real and substantial and could be entirely abandoned without in any way affecting the interstate commerce of the petitioner resulting from the sales of paper made by the Massa-

chusetts office in other states to residents of Massachusetts or elsewhere.

*Keystone Watch Case Co. v. Commonwealth*,  
212 Mass. 50.

*Kidd v. Pearson*, 128 U. S. 1, 20.

*United States v. E. C. Knight Co.*, 156  
U. S. 1.

*Cornell v. Coyne*, 192 U. S. 418, 428.

Furthermore, even aside from its manufacturing business the petitioner plainly carries on at its Boston office "a purely local and domestic business quite separate from its interstate transactions" in the sales made by it in Massachusetts to Massachusetts customers. These sales constitute about fourteen per cent. of all the sales made by this office. In this respect this corporation is in the same situation as the *S. S. White Dental Manufacturing Company* which was held to be subject to this tax in *Baltic Mining Co. v. Massachusetts*. That corporation was conducting a substantial business at its Massachusetts office in selling to Massachusetts customers goods from a local stock. The petitioner at its Boston office is conducting a substantial business of selling goods manufactured in Massachusetts to Massachusetts customers. The fact that it maintains at no point any particular stock does not distinguish the cases. The petitioner's business is even more plainly local, since it manufactures its goods in Massachusetts and does not import them from another state, as did the *S. S. White Company*.

It conclusively follows that until the enactment of St. 1914, c. 724, the petitioner was subject to the

excise tax, limited to \$2,000, levied at the rate of one fiftieth of one per cent. of its authorized capital, imposed by section 56 of the Massachusetts tax law.

### III.

#### THE REAL QUESTION PRESENTED BY THE RECORD.

The only practical effect of the enactment of the 1914 statute was to remove the maximum limit of \$2,000 theretofore imposed upon the foreign corporation excise tax and to subject all corporations, whose authorized capital was sufficiently large to bring their tax to the \$2,000 limit, to a further tax of one one hundredth of one per cent. on their entire authorized capital above that amount. It thus removed the limit theretofore existing and reduced the rate to one one hundredth of one per cent. to the extent that the authorized capital exceeds ten million dollars.

Thus, as it is plain that the petitioner could not complain as to the validity of the original tax, the only question raised by this record is whether St. 1914, c. 724, by thus increasing the amount of the excise tax required to be paid by this petitioner by one one hundredth of one per cent. of its authorized capital exceeding ten million dollars, namely, by the amount of \$3,500, turns the Massachusetts excise tax so far as this corporation is concerned into an unconstitutional exaction either in whole or in part. The question is: Does this statute turn a valid tax into one which (1) has the necessary effect of burdening interstate commerce; or (2) taxes property beyond the jurisdiction of the State; or (3) so discriminates against the petitioner as to deny to it the equal

protection of the laws of the State? Does this statute have this effect, either as a general scheme of taxation in all cases, or in its application to the particular facts involved in the case of the petitioner?

As the only effect of this statute is to remove the limit formerly imposed upon the excise tax and to measure that tax by the full authorized capital of the corporation at the rate of one-fiftieth of one per cent. up to ten million dollars and one one hundredth of one per cent. above that amount, the question more simply put merely is, Does that change alone render this tax a violation of the Federal Constitution on the grounds above stated?

#### IV.

##### GENERAL SCHEME OF 1914 STATUTE VALID.

In *Baltic Mining Co. v. Massachusetts* this court adopted without hesitation the conclusion of the Massachusetts court that the original tax imposed by the Statute of 1909 was not a property tax but an excise, in the determination of which the authorized capital of the corporation is used only as a measure. (231 U. S. 84, 87.) This measure the court stated to be "in itself lawful, without the necessary effect of burdening interstate commerce" (p. 87).

Obviously the additional tax imposed by the new statute is of precisely the same character. It is called by the statute an excise and involves no change in the legislative policy of the Commonwealth regarding the taxation of the corporations, either in the nature of the tax or the form in which it is imposed. It constitutes merely an amplification of that policy

through the imposition of a new and additional excise precisely like that already in force. The tax is held by the Supreme Judicial Court of Massachusetts in the case at bar to be strictly an excise on precisely the same grounds as the original tax was so regarded. The result is that this corporation is now subject to excise taxes measured by its entire capital stock and not merely measured by a part of it, as was the case under the original statute.

The respondent contends that this change in the measure and amount of the tax in no way affects its validity under the Federal Constitution.

As the petitioner is conducting a purely local business separable from its interstate commerce and it is thus within the power of Massachusetts to impose an excise upon it for the privilege of engaging in that business in the State, such excise to be measured by its authorized capital stock, it necessarily follows that the whole authorized capital may be so used in all cases without reference to the amount of such capital. We must assume that we are dealing with a subject of taxation entirely within the power of the State; otherwise, the corporation would not be subject to the original limited excise tax.

The Statute of 1914 thus has to do merely with the amount of the tax in cases which admittedly come within the power of the State to tax to some extent. That in such cases a tax may be levied at a given percentage of the entire authorized capital stock of a corporation, without reference to where its property is located or whether such property is within the jurisdiction of the State or not, is well established by the decisions of this court.

In *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, this court sustained a tax imposed by the State of Pennsylvania upon a Colorado corporation for the privilege of having an office in Philadelphia "for the use of its stockholders, officers, agents and employees", the tax being assessed at one fortieth of one per cent. of the entire authorized capital of the corporation. The court held that as Pennsylvania could, subject to certain limitations, entirely exclude a corporation from doing business within its borders, "it could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation" (p. 186).

It will doubtless be suggested that no question relating to interstate commerce was discussed in this case. That, however, in no way affects its bearing upon the question now before the court. The court there found that the corporation was engaging in activities in Pennsylvania which it was within the power of that State to tax, and then held that the tax in such a case could be measured by the entire authorized capital of the corporation. This is precisely the situation in the case at bar, for the question now under discussion cannot arise until the court has held that this corporation is conducting a purely local business in Massachusetts within the taxing power of that State.

A similar case was *Horn Silver Mining Co. v. New York*, 143 U. S. 305. There the court sustained a tax on a foreign corporation doing business in New York measured at a certain percentage of the value

of its capital stock, determined on a dividend basis, or, where there were no dividends, measured at a percentage of the actual value of such stock. With full recognition of the limitations imposed by the commerce clause upon the power of the states to tax (see p. 314) the court sustained this tax on the ground that the corporation was engaged in business in the State within its power to reach by taxation. At page 315 the court says, —

“Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital.”

Finding that this tax is levied upon activities within the power of the State to tax, this court expressly says, “The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court” (p. 317).

In *Kansas City Ry. Co. v. Kansas*, 240 U. S. 227, this court sustained an annual tax imposed by the statutes of Kansas, graduated according to the entire amount of paid-up capital stock, imposed upon a railroad corporation organized under the laws of that state whose road extended into several states. Here the subject matter of taxation was one well within the power of the State, namely, the franchise of a corporation created by it. In dealing with the measure of this tax adopted by the statute this court said: —

"The authority of the State to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in *Society for Savings v. Coite*, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in *Home Ins. Co. v. New York*, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 165. It is also manifest that the State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. *Delaware Railroad Tax*, 18 Wall. 206, 231, 232; *State Railroad Tax Cases*, 92 U. S. 575, 603; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, *supra*; *Ashley v. Ryan*, 153 U. S. 436; *Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, 559, 560. And, agreeably to the principle above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (*Baltic Mining Co. v. Massachusetts*, *supra*), to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not

to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

In *Kansas City, Etc. R.R. Co. v. Stiles*, 242 U. S. 111, the tax involved was a franchise tax measured by the full amount of the paid-up capital stock imposed by the State of Alabama upon a railroad corporation incorporated in that State and also in Mississippi and Tennessee. The court held that the franchise to be a corporation in Alabama, accepted and exercised by the corporation, was plainly a subject matter of taxation within the jurisdiction of that State. To the objection that such a measure of taxation imposed a tax upon property beyond the jurisdiction of the State the court said:—

"There is no attempt in this case to levy a property tax; a franchise tax within the authority of the State is in part measured by the capital stock representing property owned in other States."

The most recent word from this court upon a question of this character is to be found in its action concerning the California foreign corporation tax law. That law required foreign corporations doing business in the State to pay an annual license fee graduated in accordance with the full amount of the authorized capital of the corporation. (See *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 280.) In the last-mentioned case the Supreme Court of California, misinterpreting the effect of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, and the cases following it in the same volume, held the California

statute to be void as necessarily imposing a burden upon the interstate commerce, in a case involving the taxation of a corporation conducting a manufacturing and mercantile business within the State. In *Albert Pick & Co. v. Jordan*, 169 Cal. 1, that court, in a case involving a foreign corporation engaged in selling goods in California but not in manufacturing, purporting to follow the decision of this court in *Baltic Mining Co. v. Commonwealth*, overruled its previous decision and sustained the tax. This latter decision was affirmed by this court without opinion on June fourth last upon the authority of *Kansas City Ry. Co. v. Kansas*, *supra*.

*Pick & Co. v. Jordan*, 244 U. S. 647.

Similar measures of taxation have frequently been sustained by this court in cases where there could be no direct tax. Thus a corporation franchise tax has been held to be valid when measured by the total capital of the corporation, even though a substantial portion of the property owned by it was excluded by the Federal Constitution from the power of the State to tax.

*Hamilton Co. v. Massachusetts*, 6 Wall. 632.  
*Society for Savings v. Coite*, 6 Wall. 594.

The Federal corporation tax law, imposing a tax measured by the entire income of a corporation, was held to be valid even though a substantial portion of the income of the corporation sought to be taxed accrued from municipal bonds and other securities beyond the Federal power to tax.

*Flint v. Stone Tracy Co.*, 220 U. S. 107.

So, also, a state in taxing an express company engaged in interstate commerce may adopt as a measure of the value of its property used in this business within the state its gross earnings received within the State, even though those earnings accrue from interstate commerce.

United States Express Co. *v.* Minnesota,  
223 U. S. 335.

A tax may be imposed upon a sleeping and parlor car company, engaged in interstate commerce, and also carrying passengers from one point to another within the state, based upon the mileage of railroad track over which the company runs its cars within the state, even though all of its cars were operated in interstate commerce.

Pullman Co. *v.* Adams, 189 U. S. 420.

A tax upon the same company for the privilege of carrying passengers from one point within the State to another point within the State was held valid, though levied at the fixed annual sum of \$3,000, without reference to the extent of this local traffic.

Allen *v.* Pullman Co., 191 U. S. 171.

The foregoing decisions and many others cited therein plainly demonstrate that, if a state may impose a tax upon a given subject of taxation, it may increase that tax to the fullest extent permitted by its Constitution.

It was earlier recognized that "the power to tax involves the power to destroy." *McCulloch v. Mary-*

land, 4 Wheat. 316, 431. And this necessary consequence of the existence of the right to tax is the real basis of many of the limitations which this court has held were placed by the Federal Constitution on the powers of the states. It was on this ground that it is held that a state cannot to any extent, no matter how slight, impose a tax upon any activities of the Federal government.

*McCulloch v. Maryland*, 4 Wheat. 316.

*Osborne v. United States Bank*, 9 Wheat. 738.

*Van Allen v. The Assessors*, 3 Wall. 573.

*Dobbins v. Commissioners of Erie County*,  
16 Pet. 435. -

*The Collector v. Day*, 11 Wall. 113.

This also was essentially the doctrine on which the power of the states to tax interstate commerce was denied.

*Case of the State Freight Tax*, 15 Wall.  
232, 276.

*Pullman Co. v. Kansas*, 216 U. S. 56, 76.

It necessarily follows from this doctrine that, if a subject matter of state taxation plainly exists, the state unless forbidden by its own Constitution may tax that subject matter to the point of destruction. Thus, if a corporation engaged in interstate commerce is also conducting a local business "real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon interstate business" (*Baltic Mining Co. v. Massachusetts*, at p. 86), a state thus has power to tax this business and may tax it to the fullest extent, even

to the extent of compelling the corporation to give up that business.

"The company cannot complain of being taxed for the privilege of doing a local business which it is free to recognize."

*Pullman Co. v. Adams*, 189 U. S. 420, 422.

This was plainly recognized by this court in *Allen v. Pullman Co.*, 191 U. S. 170, where the court, referring to the last-mentioned case, declared, at p. 181, —

"Upon this proposition we are unable to distinguish this case from *Pullman Co. v. Adams*, 189 U. S. 420, decided at the last term, wherein it was held that the privilege tax imposed by the State of Mississippi, upon each car carrying passengers from one point in the State to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit."

For a further discussion of the point that the ratio of local profits to the amount of the tax is immaterial, see original brief of the Commonwealth in No. 12, *Cheney Brothers Co. v. Commonwealth*, and the opinion of the Supreme Judicial Court of Massachusetts in that case. (218 Mass. 566.)

From the foregoing principles it necessarily follows that, if the petitioner is engaged in Massachusetts in a local business separable from its interstate commerce, which is thus within the taxing power of the State, the reasonableness of the tax imposed is purely a question for the Legislature of Massachusetts and

for the courts of that State in interpreting and applying its Constitution. The discussion of that matter is not open in this court.

## V.

THE ADDITIONAL TAX IMPOSED UPON THE PETITIONER BY THE STATUTE OF 1914 DOES NOT UPON THE PARTICULAR FACTS OF THIS CASE HAVE THE NECESSARY EFFECT OF BURDENING ITS INTERSTATE COMMERCE.

If we assume, contrary to the proposition just demonstrated, that the reasonableness of the tax imposed upon the petitioner for the privilege of conducting its local business in Massachusetts is open in this court, it must be on the ground that in some manner a tax of an unreasonable amount upon the privilege of conducting the local business thereby, because of its character, necessarily imposes a burden upon interstate commerce. This contention, however, really begs the whole question that lies at the foundation of cases of this character; for the right to tax the privilege of engaging in a local business has time and again been founded, as already pointed out, upon the freedom of the corporation to abandon that business, if it does not like the burden imposed upon it, without interfering with its interstate commerce. That right to abandon is as freely open to the corporation whether the tax be small or unreasonably large.

In no event, however, on the facts disclosed by the record, can it be held that the tax imposed upon this petitioner was to any extent unreasonable in view of the value to it of the privileges exercised by it in

Massachusetts. The additional tax imposed under the statute of 1914 was \$3,500, making a total of excise taxes paid by this petitioner to Massachusetts of \$5,500. It operates in the State a plant for the manufacture of paper, assessed for purposes of taxation at nearly half a million dollars, and doubtless in fact worth much in excess of that sum. The extent of the manufacturing done by it does not appear, but it is obvious that it must be very large. There is no suggestion in the record as to the extent of the profits made directly by this manufacturing, but it is obvious that these profits must be many times the amount of the tax in question; for otherwise the petitioner could not obtain a fair return upon its investment in Massachusetts, which, of course, includes not only the actual value of its Massachusetts plant but such portion of its huge capital as is employed in its Massachusetts business. Plainly the tax of \$5,500 would not be an unreasonable one if imposed solely upon the privilege of employing its capital in the manufacture of paper in Massachusetts.

But the petitioner also enjoys in Massachusetts the additional privilege of maintaining an office for the sale of the product of its Massachusetts plant to Massachusetts customers. The record is entirely silent as to the extent of the sales made by the Massachusetts office, merely declaring that 14 per cent. of them are domestic sales, the remainder being for interstate delivery. In the absence of evidence, it cannot be assumed that the profits from this 14 per cent. of the sales of its Massachusetts office are not of such an amount as to render this license fee a very modest one in proportion thereto.

Then, the privilege of maintaining an office in Massachusetts for conducting a local business in that State is undoubtedly worth to the petitioner, with its large capital and its many manufacturing plants located throughout the country, much more through the indirect benefits which accrue from that privilege to its general business than would a similar privilege be worth to a smaller corporation, even though the direct profits involved were substantially the same.

As Rugg, C.J., aptly puts it in concluding his opinion in this case: — "We know of no principle of law which requires the conclusion that a license fee of that amount is unduly or unreasonably great to a corporation of such large capital as the petitioner, for the privilege of admission to the local markets of this Commonwealth for the transaction of an intrastate business in the manufacture and sale of an undisclosed quantity of paper of undisclosed value and out of which an undisclosed profit is realized."

## VI.

THE TAX IN QUESTION DOES NOT DENY TO THE PETITIONER THE EQUAL PROTECTION OF THE LAWS.

The petitioner contends that the Statute of 1914 in increasing the tax imposed upon it denied to it the equal protection of the laws within the principles laid down by this court in *Southern Railway Co. v. Greene*, 216 U. S. 400.

The meaning and effect of that decision and its application to a corporation of this character is fully

discussed in the brief of the Commonwealth in No. 12, Cheney Brothers Co. v. Commonwealth. That discussion need not be repeated here. To bring itself within the rule upon which it relies, the petitioner must show, first, that prior to the increase of its tax, it had acquired a permanent property in the State within the meaning of that decision, and second, that the increase in the amount of its tax constituted a discrimination against it in comparison with other corporations, particularly similar domestic corporations. It is submitted that the petitioner has established neither of these propositions.

1. *It has acquired no Permanent Property within the State.*

As is pointed out in the brief referred to and by the decisions of the Supreme Judicial Court of Massachusetts in the case at bar and the case of the White Compan , involved in No. 12 (218 Mass. 579), the term "permanent property" as used in the Greene case has a very definite meaning. It has been applied only to a property, because of its character, irretrievably devoted to a specific use which cannot be withdrawn from that use; such as a railroad property. It has never been applied merely to real estate or even to real estate adapted to some special use which could not be changed without inconvenience or loss. To extend this term to include such property would seriously limit the right of the states to change their tax laws.

It is plain that the petitioner has not acquired a permanent property in the sense in which that term is used by this court.

Its real estate is adapted for use in one of the leading industries of Massachusetts, in which there is a very general competition both within and without the Commonwealth. There is nothing to indicate that its investment in real estate is not readily salable at a reasonable price. Obviously if it went out of business and was unable to find a purchaser who desired to manufacture paper, it probably could not obtain the full value of its plant as a paper manufacturing establishment. That would be the experience, however, of almost every manufacturing establishment which maintains a plant devoted to its particular uses. It is one of the ordinary risks of engaging in any business which is in any degree specialized.

The property of this petitioner is not "of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment." (218 Mass. 580.)

2. *There has been no Discrimination against the Petitioner in the Increase of its Tax.*

The petitioner contends that the enactment of the statute of 1914 constitutes a discrimination against it in favor of domestic corporations. Such corporations, however, are taxed under an entirely different system, so that a comparison between the effects of the two different methods of taxation is very difficult. The essential provisions of the statutes of Massachusetts imposing taxes upon the franchises of domestic business corporations are set forth in this

brief, p. 7. The application of them obviously requires much information as to the property of the particular corporation, which is not before the court with reference to the property of the petitioner.

It is impossible to determine from the record, as none of the necessary items are given, what would be the tax of the petitioner if it should become a domestic corporation in the Commonwealth with its capital stock unchanged and its property holdings the same as they now exist. Section 43 of Part III of the Tax Act, referring to the franchise tax imposed on domestic corporations, provides:

"and the total amount of tax to be paid by such corporation in any year upon its property locally taxed in this commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent of the market value of its capital stock at the time of said assessment as found by the tax commissioner."

The petitioner, in the year 1915, paid to the town of Montague the sum of \$8,118 upon its property locally taxed in that town, which appears to be all its property locally taxed in the Commonwealth. It appears that of its authorized capital between \$39,000,000 and \$40,000,000 in par value is already issued and outstanding. If we assume that these shares are worth their par value, and there is no suggestion in the record that they are worth less than that, the total of the property tax and the franchise tax to be paid by this corporation must, under the provision of section 43 just quoted, be not less than \$39,000. This would make the franchise tax not less than \$30,882, or more than five times as much as the excise taxes

now paid by the petitioner. The value of the stock would have to be reduced below 36 per cent. of the par value before the taxes of such a domestic corporation would fall below those of the petitioner.

Plainly a mere casual comparison of the statutes imposing franchise taxes upon domestic corporations and those imposing excise taxes upon foreign corporations shows that these statutes discriminate, if at all, not against foreign corporations but in their favor as against domestic corporations.

In no event, therefore, can the decision in *Southern Railway Co. v. Greene* aid the petitioner.

## VII

### CONCLUSION.

Accordingly, the Commonwealth of Massachusetts contends that the tax imposed upon this petitioner violates no provision of the Federal Constitution and that the decree of the Supreme Judicial Court of Massachusetts affirming the validity of the tax and dismissing the petition for abatement of the tax should be affirmed.

HENRY C. ATTWILL,

*Attorney-General for the Commonwealth  
of Massachusetts.*

WM. HAROLD HITCHCOCK,

*Assistant Attorney-General.*



FILED  
JAMES D. MAHER  
CLERK

---

**Supreme Court of the United States**

OCTOBER TERM, 1917

**No. 733**

**INTERNATIONAL PAPER COMPANY**

**THE COMMONWEALTH OF MASSACHUSETTS**

**No. 734**

**THE LOCOMOBILE COMPANY OF AMERICA**

**THE COMMONWEALTH OF MASSACHUSETTS**

---

**MOTION TO ADVANCE**

---

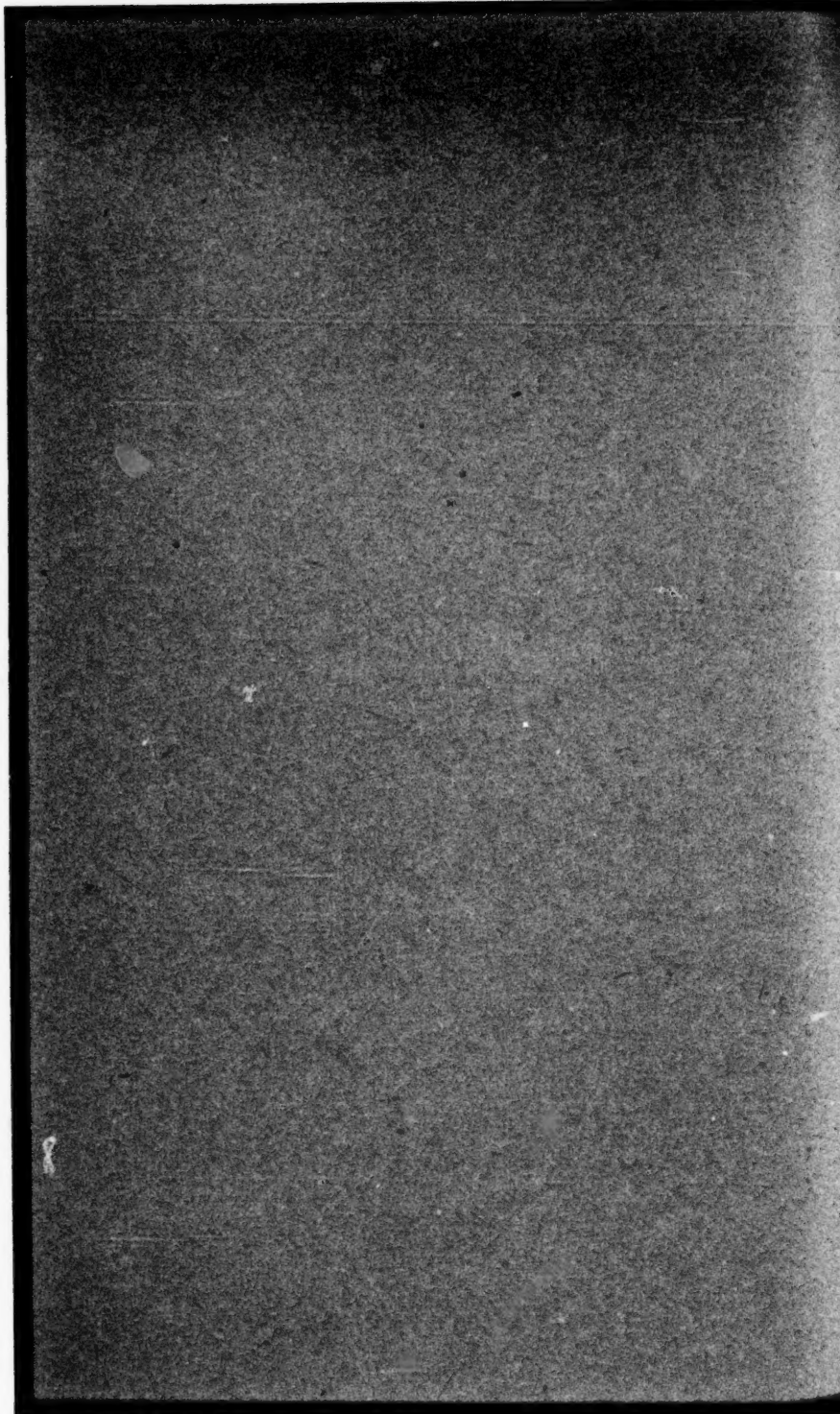
**HENRY C. ATTWILL,**

*Attorney-General*

**WM. HAROLD HITCHCOCK,**

*Assistant Attorney-General*

---



# Supreme Court of the United States

OCTOBER TERM, 1917

No.

---

INTERNATIONAL PAPER COMPANY

v.

THE COMMONWEALTH OF MASSACHUSETTS

No.

---

THE LOCOMOBILE COMPANY OF AMERICA

v.

THE COMMONWEALTH OF MASSACHUSETTS

---

## *MOTION TO ADVANCE*

---

HENRY C. ATTWILL,  
*Attorney-General*

WM. HAROLD HITCHCOCK,  
*Assistant Attorney-General*



# Supreme Court of the United States.

October Term, 1917.

---

No.

INTERNATIONAL PAPER COMPANY

*v.*

THE COMMONWEALTH OF MASSACHUSETTS.

---

No.

THE LOCOMOBILE COMPANY OF AMERICA

*v.*

THE COMMONWEALTH OF MASSACHUSETTS.

---

## MOTION TO ADVANCE.

And now comes the defendant-in-error in the above-entitled cases and moves that each of said cases be advanced and be heard together with No. 12, Cheney Brothers Company et al. *v.* The Commonwealth of Massachusetts.

## REASONS FOR MOTION.

No. 12, Cheney Brothers Company et al. *v.* Commonwealth was argued April 20, 1916, and in June last was restored to the docket for re-argument. It is

expected to be reached in the call of the docket during the next few days of this week. It involves the validity of excise taxes assessed in 1913 by Massachusetts on seven different foreign corporations, the chief claim being that these taxes violate the commerce clause and equal-protection-of-the-laws clause of the Federal Constitution.

In 1914 Massachusetts enacted St. 1914, c. 724, the important section of which is as follows:

"Every foreign corporation subject to the tax imposed by section fifty-six of part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one-hundredth of one per cent. of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

The International Paper Company, having a capital stock in excess of \$10,000,000, was required to pay a tax of \$2,000, in accordance with the original statute under which the petitioners in No. 12 were assessed, and also required to pay a further amount of \$3,500 under the statute of 1914. Its petition for recovery of the tax was dismissed by the Supreme Judicial Court of Massachusetts on September 25, 1917, and the case is here upon writ of error. That petition raises the same questions as to the validity of the original tax as are raised in No. 12, and also attacks the validity of the statute of 1914 and the tax imposed upon the petitioner thereunder.

The Locomobile Company of America is one of the corporations involved in No. 12. At the time of the assessment of the tax there in litigation its capital was \$5,000,000, and the tax upon it \$1,000. After the assessment of that tax it increased its capital to \$6,500,000, and after the enactment of the statute of 1914 it was assessed a tax of \$1,300. The facts set forth in the record in the new petition of this company are the same as those stated concerning it in No. 12, the only additional facts being this increase of capital stock and the fact that none of that increase was employed in its local Massachusetts business. In its new petition this corporation attacks the validity of the tax now assessed upon it, on the same grounds that it attacks the tax in question in No. 12, and also upon additional grounds growing out of the enactment of the statute of 1914. Its petition for recovery of the tax was dismissed by the Massachusetts Supreme Judicial Court, and the case is here upon writ of error.

These two new cases will require the argument of precisely the same questions argued in No. 12, and also the argument of very similar questions raised by the removal of the original limitation of \$2,000 upon the amount of the tax by the new statute. Those questions must be considered in relation to the similar questions arising under the original statute. All questions involved in all of these cases are thus closely interrelated.

It is the opinion of counsel that it is greatly in the interests of clearness that these cases be argued together, and that such action will save a large amount of time and labor both to the court and to counsel.

Many cases involving singly and in total large sums of money are pending in Massachusetts, brought by these same corporations and by other corporations similarly affected, to test the validity of taxes assessed both before and after the enactment of the statute of 1914. It is of great importance both to the State and to foreign corporations engaged in business therein that the questions thus raised as to the validity and application of the Massachusetts foreign corporation tax law be determined promptly, and, so far as possible, in one decision and not piecemeal.

THE COMMONWEALTH OF MASSACHUSETTS,

By HENRY C. ATTWILL,

*Attorney-General.*

WM. HAROLD HITCHCOCK,

*Assistant Attorney-General.*

The International Paper Company and the Locomobile Company of America acknowledge service of a copy of the above motion to be presented on October 8, 1917, and for the reasons above stated join in urging its allowance.

CHARLES A. SNOW,

WILLIAM P. EVERTS,

*Attorneys for Plaintiffs-in-Error.*

Office Supreme Court, U. S.  
FEB. 15 1917

OCT 9 1917

JAMES D. MAHER,  
CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 733

INTERNATIONAL PAPER COMPANY,

Plaintiff in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

No. 734

THE LOCOMOBILE COMPANY OF AMERICA,

Plaintiff in Error,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

In Error to the Supreme Judicial Court  
of the State of Massachusetts.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES A. SNOW,  
FRANK T. BENNER,  
WILLIAM P. EVERTS,

*Counsel for Plaintiffs in Error.*



# Supreme Court of the United States.

OCTOBER TERM, 1917.

No.

INTERNATIONAL PAPER COMPANY,

*Plaintiff in Error,*

*v.*

THE COMMONWEALTH OF MASSACHUSETTS.

No.

THE LOCOMOBILE COMPANY OF AMERICA,

*Plaintiff in Error,*

*v.*

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT  
OF THE STATE OF MASSACHUSETTS.

BRIEF FOR PLAINTIFFS IN ERROR.

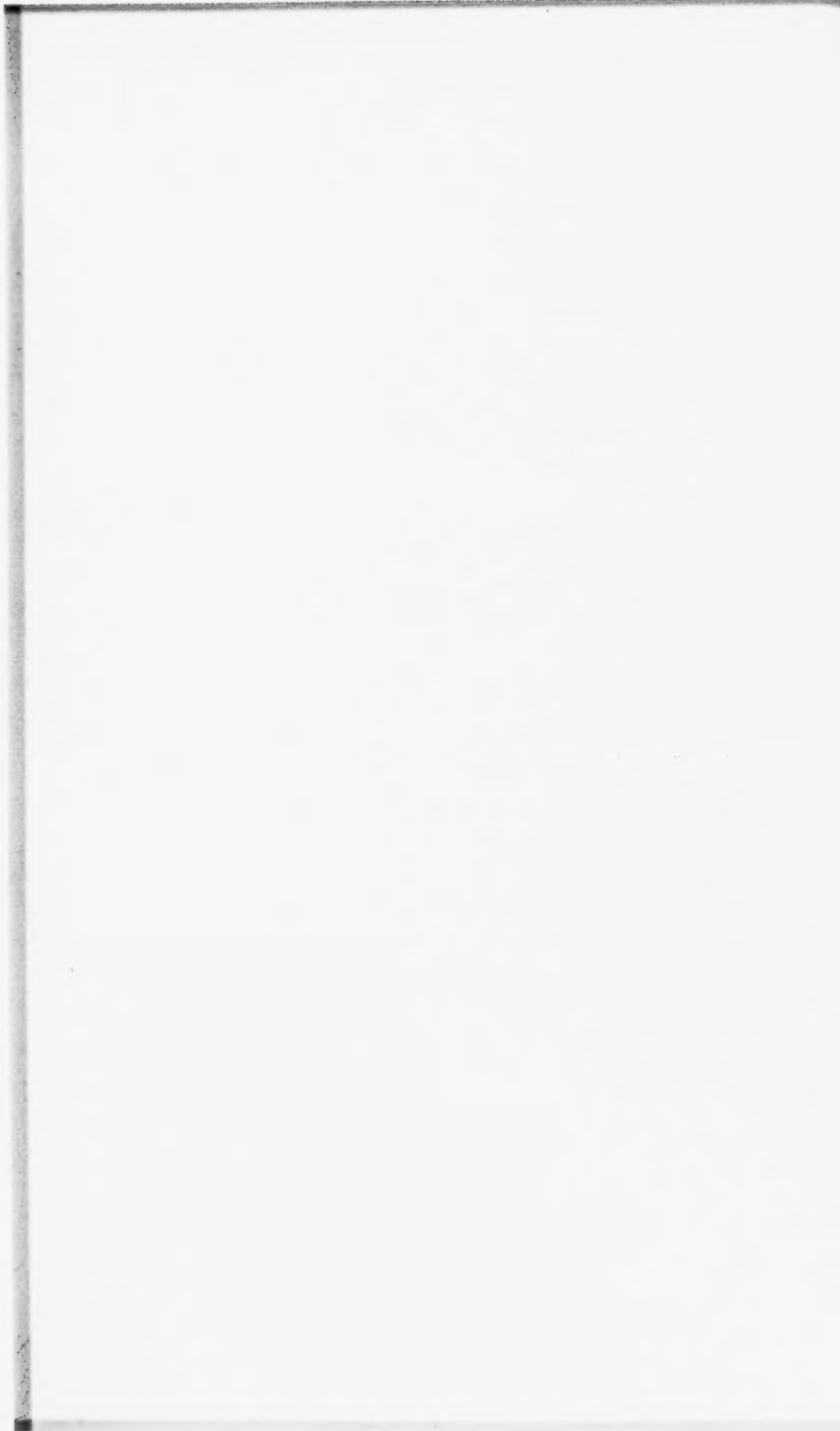
CHARLES A. SNOW,  
FRANK T. BENNER,  
WILLIAM P. EVERTS,

*Counsel for Plaintiffs in Error.*

**The Fort Hill Press**

SAMUEL USHER

BOSTON, MASS.



## SUBJECT INDEX.

	PAGE
STATEMENT OF CASE . . . . .	1
Original Massachusetts Statute of 1909 . . . . .	2
Amendment of 1914 . . . . .	2
SPECIFICATION OF ERRORS . . . . .	4
BRIEF OF ARGUMENT . . . . .	5
I.	
COMMERCE CLAUSE . . . . .	5
Western Union decisions here conclusive. Being in precisely the same terms as the Kansas statute, the Massachusetts excise must have exactly the same "necessary operation and effect" in "burdening" interstate commerce . . . . .	5
Recent decisions, which involve excises on domestic corporations measured by capital stock in part used in interstate commerce, have not done away with the effect of the <i>Western Union</i> decisions as to foreign corporations, which condemned fluctuating excises, like the Massachusetts and Kansas excises, as having the "necessary operation and effect" of "burdening" interstate commerce . . . . .	12
The tendency of the late decisions as to domestic corporations has been to allow a "measure," a form or a device to obscure the "substance," "reality" and actual or "necessary operation and effect" of corporate excise taxation, which were fully investigated and reached in the <i>Western Union</i> cases . . . . .	15
The "necessary operation and effect" of such excise is to "burden" interstate commerce, as conclusively settled by the <i>Western Union</i> decisions. . . . In addition, there is ample reason to conclude that the direct "purpose" of the Massachusetts statute is to tax and burden such commerce . . . . .	17

iv

II.

	PAGE
THE MASSACHUSETTS EXCISE IS UNCONSTITUTIONAL AND VOID, BECAUSE IT INVOLVES THE "EQUAL PROTECTION OF THE LAWS" CLAUSE, UNDER THE DOCTRINE OF <i>Southern Railway Co. v. GREENE</i> (216 U. S. 400) . . . . .	21
Facts bringing the <i>International Paper</i> case directly within the authority of <i>Southern Ry. Co. v. Greene</i> (216 U. S. 400) . . . . .	22

III.

"EQUAL PROTECTION" CLAUSE, AS APPLIED TO THE DISCRIMINATION AGAINST THE SMALLER CORPORATIONS .	26
The attempt to compare the tax burdens on foreign and domestic corporations is not open to the Commonwealth, upon this record . . . . .	28

IV.

THE CLAIM OF THE COMMONWEALTH THAT THE ORIGINAL AND AMENDED STATUTES ARE SEPARABLE AND THAT THE AMENDMENT OF 1914 MAY BE DECLARED UNCONSTITUTIONAL, WITHOUT AFFECTING THE CONSTITUTIONALITY OF THE ORIGINAL STATUTE, IS NOT OPEN TO IT, UPON THE RECORD, BECAUSE NO SUCH QUESTION WAS PASSED UPON BY THE COURT BELOW .	29
--	----

## LIST OF CASES.

	PAGE
Atty. Genl. <i>v.</i> Electric Storage Battery Co., 188 Mass. 239,	18
Baltic Mining Co. <i>v.</i> Commonwealth, 207 Mass. 381 . . . .	18
Baltic Mining Co. <i>v.</i> Massachusetts, 231 U. S. 68 . . . .	8, 15
Cheney Brothers Company et al. <i>v.</i> Massachusetts (No. 12),	1
Chicago Dock Co. <i>v.</i> Fraley, 228 U. S. 680, 687 . . . .	26
Connolly <i>v.</i> Union Sewer Pipe Co., 184 U. S. 540 . . . .	27
Cotting <i>v.</i> Kansas City Stockyards Co., 183 U. S. 79 . . .	27
Flint <i>v.</i> Stone Tracy Co., 220 U. S. 107 . . . . .	8, 15, 16
Galveston &c. Ry. Co. <i>v.</i> Texas, 210 U. S. 217, 228 . . . .	15
Gulf, Colorado & Santa Fé Ry. <i>v.</i> Ellis, 165 U. S. 150 . . .	27
Kansas City Railway Co. <i>v.</i> Kansas, 240 U. S. 227, 235,	6, 8, 11, 13, 14
Kansas City &c. R. R. Co. <i>v.</i> Stiles, 242 U. S. 111, 119,	8, 9, 12, 13, 14
Pick <i>v.</i> California (decided June 4, 1917) . . . . .	13, 14
Sioux Remedy Co. <i>v.</i> Cope, 235 U. S. 197, 203 . . . . .	8, 15
Smith <i>v.</i> Texas, 233 U. S. 630 . . . . .	27
Southern Ry. Co. <i>v.</i> Greene, 216 U. S. 400 . . . . .	2, 4, 21, 22, 27
S. S. White etc. Co. <i>v.</i> Commonwealth, 212 Mass. 35 . . . .	18
U. S. Express Co. <i>v.</i> Minnesota, 223 U. S. 335 . . . . .	15
Western Union Tel. Co. <i>v.</i> Kansas, 216 U. S. 1 . . . . .	8, 14, 21



# Supreme Court of the United States.

OCTOBER TERM, 1917.

No.

INTERNATIONAL PAPER COMPANY,

*Plaintiff in Error,*

*v.*

THE COMMONWEALTH OF MASSACHUSETTS.

No.

THE LOCOMOBILE COMPANY OF AMERICA,

*Plaintiff in Error,*

*v.*

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE  
OF MASSACHUSETTS.

## BRIEF FOR PLAINTIFFS IN ERROR.

### STATEMENT OF CASE.

These cases are argued with *Cheney Brothers Company et al. v. Massachusetts* (No. 12).

For arguments and authorities in detail we refer to our brief in that case.

The present cases involve two main additional questions:

(1) Is the present Massachusetts foreign corporation tax system unconstitutional under the "commerce" clause, the \$2,000 limitation, under St. 1909, c. 490, Part III, Sec. 56, having been removed by St. 1914, c. 724?

(2) Is this excise unconstitutional under the "equal protection" clause, within the doctrine of *Southern Ry. Co. v. Greene* (216 U. S. 400), because of the special facts here appearing which are even stronger than those argued by the *White Company* in the *Cheney* case?

#### ORIGINAL MASSACHUSETTS STATUTE OF 1909.

The original statute involved in the *Cheney* case is as follows:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one-fiftieth of one per cent of the par value of its authorized capital stock, as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." (Massachusetts Acts 1909, c. 490, Part III, Sec. 56).

These excises were levied under the present Massachusetts system of *unlimited* taxation, with a percentage rate of one-fiftieth of one per cent on the total authorized capital up to \$10,000,000 and one one-hundredth of one per cent beyond that amount.

The International tax is \$5,500 on an authorized capital of \$45,000,000, of which between \$39,000,000 and \$40,000,000 has been issued. The Locomobile tax is \$1,300 on an authorized capital of \$6,500,000, of which \$6,250,000 has been issued.

#### AMENDMENT OF 1914.

These taxes are levied under the terms of the original statute (*supra*), as amended or added to by the 1914 statute, as follows:

"Every foreign corporation subject to the tax imposed by section fifty-six of Part III of Chapter four hundred and ninety of the Acts of the year nineteen hundred and nine

shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the Commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one-hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition." (Mass. Acts 1914, c. 724.)

One-fiftieth of one per cent of a \$10,000,000 capitalization equals \$2,000, so that the new statute, taxing beyond \$10,000,000 at the rate of one one-hundredth of one per cent, repeals the limitation in the original statute contained in the last clause, — "but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

## SPECIFICATION OF ERRORS.

The Court below erred in refusing requests for rulings of law in such case, in substance as follows:

1. That these excises are unconstitutional and void, under the "commerce" clause (1st Request, 1st Ass't Errors in each case).

2. That they are unconstitutional and void, under the "equal protection of the laws" clause (3d Request, 3d Ass't Errors in each case).

3. That they are unconstitutional under the principles of the *Western Union* decisions, 216 U. S. 1, 56 (4th and 5th Requests, 4th and 5th Ass'ts Errors).

4. That they are unconstitutional because they conflict with the "equal protection" clause, under the principles of *Southern Ry. Co. v. Greene*, 216 U. S. 400 (9th Request, International case).

5. That they are unconstitutional under the "equal protection" clause, because they arbitrarily discriminate against the smaller corporations, having a capitalization of less than \$10,000,000, and in favor of the richer and larger corporations, having a capital in excess of that amount, by taxing the former at a rate twice as high as the latter (9th Request, Locomobile case).

6. That the statutes authorizing these excises are unconstitutional under the Massachusetts Constitution (Part 2, c. 1, Sec. 1, Art. 4), which limits the power of the legislature to the imposition of "reasonable" excises (12th Request, International case; 14th Request, Locomobile case).

7. That the petitioner in each case, upon the agreed facts, is entitled to recover the tax paid by it (13th Request, International case; 15th Request, Locomobile case).

## BRIEF OF ARGUMENT.

## I.

## COMMERCE CLAUSE.

**Western Union Decisions Here Conclusive. Being in precisely the Same Terms as the Kansas Statute, the Massachusetts Excise Must Have exactly the Same "Necessary Operation and Effect" in "Burdening" Interstate Commerce.**

The authorities have been reviewed in detail in our *Cheney* brief.

We reiterate the arguments therein presented, but shall here only attempt to state the result of the authorities, as applied to the present Massachusetts tax system, which now has no limitations as to amount.

It levies in many cases excises of more than \$10,000, annually. A corporation with a capitalization of \$100,000,-000 has to pay an excise amounting to \$11,000. The United States Steel Corporation, with \$940,000,000 authorized capital, would have to pay nearly \$100,000 annually for the local privilege, if it cared to exercise it. The Massachusetts excises, being payable *annually*, are, therefore, far greater in amount than the *single* payments of \$14,800 and \$20,100 involved in the *Western Union* cases.

We have shown in our *Cheney* brief that the *Baltic* decision, as expressed by the Court in the opinion (231 U. S. 68, 86), rests upon its special facts, not applicable here, because the *Baltic* company was not transacting interstate and domestic commerce conjointly, by the use of the *same instrumentalities* at the *same places*. Further, the present companies have no surplus assets beyond the par value of the issued capital stock, so far as the record shows. Apparently the International company is taxed on \$5,000,000 to \$6,000,000 *unissued* capital, which represents no assets whatsoever.

If the above was not the real ground of the *Baltic* de-

cision, it must rest upon the basis stated by this Court in its latest authoritative statement.

As stated by Mr. Justice Hughes:

"It was because the [Baltic] tax, although measured by authorized capital stock, could not *in view of its limitations* be regarded as imposing a direct burden upon interstate commerce that the tax was upheld."

*Kansas City Railway v. Kansas*, 240 U. S. 227, 235.

Accordingly the Court concluded, in the latter case (*ibid.*):

"We find no ground for saying that a tax of this character, *thus limited*, is in any sense a tax imposed upon interstate commerce."

All "limitations" are now removed (St. 1914, c. 724).

The reason given for the *Baltic* decision is thus completely out of the way.

That decision may, accordingly, be wholly disregarded as of no importance in this case, involving the constitutionality of the present *unlimited* foreign corporation tax system of Massachusetts.

The direct question now presented is whether the carefully considered *Western Union* decisions are to be overruled, for it cannot fairly be maintained that there is any reasonable distinction between the Kansas tax and the present amended Massachusetts statute, in almost identical terms, even in point of the rate, \$200 per million amounting to exactly one-fiftieth of one per cent, the rate paid by the Locomobile company. Both systems are *unlimited*. Both "fluctuate" in exact proportion to *any* increases in interstate commerce and the capital represented thereby, however trifling.

In each case, the amount of the excise cannot be determined without taking into account increases of interstate business and capital, and is exactly and exclusively *measured*

thereby, becoming greater or less in precise proportion to the increase or diminution of such business or capital, without taking account of the mere size of the corporation or any other factors.

In other words, the tax is not "measured" merely by the size of the corporation, using authorized capital as a rough and ready rule. The tax is *measured* solely by increases in interstate business, whenever such increases occur, as represented by increased capital.

Neither system provides for *fixed* license fees or for any *classification* for the purpose of determining *fixed* fees.

The Kansas tax used capital stock as a mere *measure*.

The Massachusetts excise does precisely the same. If anything, the Massachusetts excise is more of a "fluctuating" tax than that of Kansas, for the latter changed according to "each million or major part thereof," while the former requires payment of an additional tax *wherever* and *whenever* capital stock, representing expansion of interstate commerce, increases by a *single dollar*.

If the *substance* and *real effect* are to be reached, and mere *forms*, technicalities and *measures* disregarded, as was there held, the same result must here be reached, where the excise is in precisely the same terms.

If the "necessary operation and effect" of the Kansas form of tax was to "burden" interstate commerce, as was there held, the "necessary operation and effect" of the Massachusetts excise must be precisely the same, because its terms, nature and character are the same.

Although we have indicated that an adverse decision must necessarily involve the overruling of the *Western Union* decisions, it should be observed that this Court, aside from the three dissenting justices, has never expressed any doubt as to the meaning or reasoning of those cases, but on the contrary, while apparently inclined not to extend the doctrine to domestic corporations, has repeatedly approved the decisions.

As stated by Mr. Justice Day:

"*Having no disposition to limit the authority of those [Western Union] cases, the facts upon which they were decided must not be lost sight of in deciding other alleged similar cases.*"

*Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 85.

The effect of the decision is nowhere better stated than by Mr. Justice Day:

"This Court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was *in reality a tax upon the right to do interstate business within the State*; . . . that whatever the declared purpose, when reasonably interpreted, the *necessary operation and effect* of the act in question was to *burden interstate commerce*, . . . and it was therefore invalid."

*Flint v. Stone Tracy Co.*, 220 U. S. 107, 163.

*Kansas City Ry. Co. v. Kansas*, 240 U. S. 227, 234, and cases cited.

” Under the circumstances therein disclosed, and the character of the business involved, this Court held that the statute was *in substance an attempt to tax the right to do interstate business* . . . and was therefore void.”

*Kansas City &c. R. R. Co. v. Stiles*, 242 U. S. 111, 119.

” If the statute reasonably interpreted, either *directly* or by its *necessary operation*, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was exacted, and although the company may do both interstate and local business.”

*Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 27.

*Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203.

We have, therefore, an uniform interpretation of the *Western Union* decisions, repeatedly stated in many cases, to the same effect as above stated in the *Flint* case, that the "*necessary operation and effect of the act in question was to burden interstate commerce . . . and it was therefore invalid.*"

If so, the "necessary operation and effect" of the Massachusetts tax system, in precisely the same terms, must also be to *burden* interstate commerce, and it is likewise invalid for the same reason.

If a mere "measure" must be disregarded as a *form* or *device* in the one case, it must in the other, when *substance* and *reality* are attempted to be reached.

The scope of these decisions is fully admitted in the recent cases as to domestic corporations, which are claimed to have weakened their authority, and where it is stated that certain forms of excises may lawfully be measured by capital stock "where the circumstances are such as to indicate no purpose or *necessary effect* in the tax imposed to *burden*" interstate commerce.

*Kansas City &c. R. R. Co. v. Stiles*, 242 U. S. 111, 119.

We have shown that the Kansas tax operated with this "necessary effect," and that the Massachusetts excise, in precisely the same terms, must have exactly the same "necessary effect."

Nor could it be maintained if claimed, that, although a tax, in the terms and form of the Kansas statute, *necessarily* operates in burdening the interstate commerce of a sleeping car or telegraph company, it would not *necessarily* operate in a similar way on the interstate business of selling paper and other goods.

The *same* tax must *necessarily* operate in substantially the *same* way on *all* companies transacting interstate and domestic commerce in conjunction, through the use of the same instrumentalities and places.

Aside from the conclusive effect of the *Western Union* decisions, it becomes apparent that a "fluctuating" tax of this description must *necessarily operate* in taxing and, therefore, burdening interstate commerce, when we consider the *actual effect* of the tax whenever and wherever capital is increased for the purpose of extending interstate business. *Every dollar* so used directly and automatically causes an additional tax, under the Massachusetts excise, which "fluctuates" in exact proportion to increases of interstate business. The tax is increased *solely by reason* of expanded interstate business and the capital employed therein. Interstate business and revenues are, consequently, in all such cases, *directly* subjected to increased taxation and burdens. That is the *actual* as well as *necessary* operation of such a tax. But it may be urged that the *necessary* operation of a tax cannot be determined solely by considering the *real effect* of increases of interstate business and capital, but that there are other cases, more or less exceptional, where capital is increased for purposes of expansion of local Massachusetts trade, where the additional burden would fall on domestic commerce and would consequently not come within the ban of the "commerce" clause.

But, with modern interstate commerce corporations, expansions of interstate commerce are the normal and usual conditions, arising constantly.

Extensions of local Massachusetts commerce are of less importance, and capital increases for such purposes occur with comparative rarity. By the "necessary operation" of a tax, is not meant what must happen under *all* possible or conceivable conditions, but the *necessary effect* of the tax in *actual operation, under ordinary and usual conditions*, which include the expansion of interstate trade and capital. The "necessary operation" of the Massachusetts excise is well illustrated by the *actual* operation of the tax in the present *Locomobile* case.

The *Locomobile* tax included an additional tax of \$300, which was levied because of an increase of authorized capital in 1913 from \$5,000,000 to \$5,500,000, used solely for purposes of extension of its interstate commerce and matters with which Massachusetts had no concern.

This additional capital stock was used solely to extend and improve the company's manufacturing plant in Bridgeport, Conn., and to increase its business of manufacturing and selling automobiles to be delivered from that plant, as above described, that is, in channels of interstate commerce.

No part thereof was used for the purpose of increasing the business of selling used cars or of making repairs, transacted, as aforesaid, at its Boston place of business (*Locomobile Record*). That is to say, its domestic business in Massachusetts remained wholly stationary, while its interstate commerce and its Connecticut assets were thereby increased. Based solely on such increase, the Massachusetts excise "fluctuated" and was automatically increased *solely by reason* of the increase in interstate commerce and the capital represented thereby. The tax as applied to the *Locomobile* company, in its *actual* operation, in this typical instance, clearly does "fluctuate" in exact proportion to "the volume of interstate business."

*Kansas City Ry. Co. v. Kansas*, 240 U. S. 227, 235.

But it is now claimed that the effect of the *Western Union* decisions has been weakened and completely changed by recent decisions, although no successful attempt can be made to differentiate the Kansas and Massachusetts excises.

The actual decisions in the recent cases, except the *Pick per curiam* decision, are confined to excises on domestic corporations.

In any event, they do not profess to overrule the *Western Union* decisions, which control here as to the precisely similar Massachusetts excises.

**Recent Decisions, which involve Excises on Domestic Corporations Measured by Capital Stock in part Used in Interstate Commerce, have Not Done Away With the Effect of the WESTERN UNION Decisions as to Foreign Corporations, which Condemned Fluctuating Excises, like the Massachusetts and Kansas Excises, as having the "Necessary Operation and Effect" of "Burdening" Interstate Commerce.**

The most recent decisions have been fully considered in our *Cheney* brief.

The results may be summarized thus:

An excise on the franchise of existence as a corporation granted to domestic corporations may be measured by their capital stock, although it represents in part interstate commerce, "where the circumstances are such as to indicate no purpose or *necessary effect* in the tax imposed to *burden* commerce of that character."

*Kansas City &c. R. R. Co. v. Stiles*, 242 U. S. 111, 119.

The *Western Union* decisions directly decided that this was the *necessary effect* of the Kansas excise.

The Massachusetts excise, in precisely the same terms, must have exactly the same *necessary effect*.

Accordingly, the *Western Union* decisions are decisive against the constitutionality of the Massachusetts tax system, as applied to foreign corporations, whatever may be the result of the latest decisions as to domestic corporations.

So, also, it is said that, where the objection is made that a tax imposes a burden upon interstate commerce, the "test of validity" is the "nature and character of the tax imposed."

*Kansas City &c. R. R. Co. v. Stiles* (*supra*), at p. 119.

The "nature and character" of the *Western Union* tax

are exactly the same as the Massachusetts excise, because the terms of the statute are precisely alike.

The "nature and character" of excises which the state may levy on corporations of its own creation are shown by the new Kansas, California and Alabama statutes.

Classified or graduated excises on domestic corporations are constitutionally valid, when they are *fixed* and *non-fluctuating*, although the classifications are determined by capital stock which, in part, represents interstate commerce.

*Kansas City Ry. v. Kansas*, 240 U. S. 227.

*Kansas City &c. R. R. Co. v. Stiles*, 242 U. S. 111.

The latter case may be thought to have gone further, because of the fact that the Alabama tax there involved would change *for every thousand dollars* of additional capital, whereas the Massachusetts excise is increased by reason of a *single dollar's* increase in capital.

But classifications were there provided for which were based on the size of the corporation, as measured and determined by the amount of its paid-up capital stock. The graduated classes consisted of the "first fifty thousand" of paid-up capital at the rate of \$1 per thousand, "the next \$950,000" at 50 cents per thousand, the next \$4,000,000 at 25 cents, and above \$5,000,000 at 10 cents per thousand.

But in any event, this decision only applies to domestic corporations.

The only case which, in any way, modifies the scope of the *Western Union* decisions, as applied to foreign corporations, is the *per curiam* decision which upheld the California excise, which applied to both foreign and domestic corporations, on the authority of *Kansas City Ry. v. Kansas* (*supra*).

*Pick v. California* (decided June 4, 1917).

However extensive may be the general language used in the *Stiles* opinion, no *actual decision* has extended the limits

of foreign corporation excise taxation beyond such excises as appear in the California and new Kansas statutes, both of which had modest maximum limitations, \$250 in the former and \$2,500 in the latter.

The law as to foreign corporations, as it stands to-day, without further weakening of the beneficent and sound *Western Union* decisions, may be stated thus:

Classified or gradated excises on foreign corporations are constitutionally valid which levy *non-fluctuating* or *fixed* taxes on corporations gradated according to their size, as measured and determined by their capital stock, although it, in part, represents interstate commerce, when accompanied with reasonable limitations on the amount of the tax.

*Pick v. California (supra).*

Cf.

*Kansas City Ry. v. Kansas (supra).*

Such excises are valid, however, only "where the circumstances are such as to indicate no purpose or *necessary effect* in the tax imposed to *burden* commerce of that character."

*Kansas City R. R. Co. v. Stiles*, 242 U. S. 111, 119.

"Fluctuating" excises, on the other hand, like the Massachusetts and *Western Union* taxes, where no classifications or gradations are attempted, are unconstitutional and void, although merely measured by capital stock, because "the circumstances are such as to indicate" the "*necessary effect* in the tax imposed to *burden*" interstate commerce.

*Western Union* cases, 216 U. S. 1, 56.

See

*Kansas City &c. R. R. Co. v. Stiles*, 242 U. S. 111, 119.

The Massachusetts excises, under both the original and the amended statutes, are, accordingly, conclusively condemned by the *Western Union* decisions, and are unconstitutional and void, unless those decisions are now to be overruled after repeated approvals by this Court.

**The Tendency of the Late Decisions as to Domestic Corporations has been to Allow a "Measure," a Form or a Device to Obscure the "Substance," "Reality" and Actual or "Necessary Operation and Effect" of Corporate Excise Taxation, which were fully Investigated and Reached in the Western Union Cases.**

"In the *Western Union* cases this Court held, *looking through forms and reaching the substance* of the thing, that the tax thus imposed was, *in reality*, a tax upon the right to do interstate business within the State."

*Flint v. Stone Tracy Co.*, 220 U. S. 107, 163.

"The *form* or mode of imposing the conditions is not nearly so important as their *necessary and practical operation*."

*Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203.

*Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 87.

*U. S. Express Co. v. Minnesota*, 223 U. S. 335.

Formerly the letter <sup>or</sup> ~~and~~ form in excise taxation was little regarded.

For example, Mr. Justice Holmes says:

"This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'"

*Galveston &c. Ry. Co. v. Texas*, 210 U. S. 217, 228.

Now the claim is frankly urged by counsel that, in all such excise cases, *forms* and *technicalities* must govern,

rather than *substance* and the *real operation and effect* of the tax as known to all or plainly observable.

It is now claimed that the mere fact that interstate business or capital is used as a mere *measure* makes a foreign corporation excise constitutional which would not otherwise be so; in other words, that a mere *device, technicality or form*, which the States are not slow in adopting, should relieve the Court from considering the *real or necessary* operation of such excises in *burdening* interstate business.

We do not, of course, mean that the "measure" of excise taxation may not properly be found, in some instances, in income, business and property which, considered by themselves, are non-taxable.

*Flint v. Stone Tracy Co.*, 220 U. S. 107, 165.

In the case of the Federal Corporation excise, some measure had to be adopted and the Court considered that "gross income" was a convenient *measure* of the size of the corporation. Such considerations do not apply to *measures* which are here adopted, which *in reality* and in their actual or *necessary effect*, tax and burden things not subject to State taxation, although they *profess* not to burden them.

But if it should be held that the mere fact of using interstate business and capital as a *measure*, makes a privilege excise constitutional, this would *merely* mean that the technical *form* or device would prevail, rather than the *real operation and substantial effect* of the tax. The *Western Union* decisions, however, passed by the *form* and reached the *substance*, deciding the excise to be invalid, notwithstanding the fact that it was used as a mere *measure*.

Looking through the *form, measure or device*, and reaching the *real or necessary* operation of the Massachusetts excise, can there be any doubt as to its *real effect* in burdening interstate commerce, whatever its professions or its intent?

Suppose that the statute had levied, in terms, a privilege tax *measured solely* by the amount of interstate business

and capital. If the interstate business and capital increase at all, the tax is increased proportionately.

In such a case it is clear that the additional tax is imposed on the increased interstate business, the revenues from which are expected and intended to pay the bill. The interstate business is therefore *burdened* to that extent. In such a case the form of using it merely as a *measure* obviously would not be allowed to hide the *real operation* of the tax.

The Massachusetts excise *in reality* operates precisely as if the statute had, *in terms*, stated that increase in the tax should be measured by increase of interstate commerce.

Nor can the real operation of such a tax be at all affected by the fact that, under certain exceptional conditions, for example, where the domestic part of the capital and business is increased, interstate commerce is not, because of such increases taxed additional<sup>ly</sup>, or subjected to further burdens. It is not necessary for us to show that in *all possible cases* the tax burdens interstate commerce, but only that this is the ordinary, usual and normal effect of such a system of taxation.

**The "Necessary Operation and Effect" of Such Excise is to "Burden" Interstate Commerce, as conclusively Settled by the Western Union Decisions. . . .**

**In Addition, there is Ample Reason to Conclude that the Direct "Purpose" of the Massachusetts Statute is to Tax and Burden such Commerce.**

While the "necessary operation and effect" of such excises as those of Massachusetts and Kansas were conclusively settled by the <sup>26</sup>decisions, and nothing beyond this need be shown, there are additional satisfactory reasons for concluding that the direct "purpose" of the Massachusetts excise is to tax and burden interstate commerce and the receipts therefrom, and that the tax rests upon a more unreasonable basis than the legislation of any other

State. In spite of the deservedly high reputation of Massachusetts and its judiciary, these excise statutes, as interpreted and applied, must be regarded as mere "devices" to reach and burden interstate business and receipts to the limit, and frequently upon the most trivial excuses.

Some of the reasons for attributing such a direct "purpose" to this legislation are as follows:

1. It is admitted that the *terms* of this statute apply to *all* foreign corporations, even those exclusively engaged in interstate commerce (*Atty. Genl. v. Electric Storage Battery Co.*, 188 Mass. 239). So that the *actual* original intent was obviously to measure the tax by *all* kinds of business, as represented by capital, even that exclusively interstate in character.

The *reality, substance and actual effect* of such a tax in burdening interstate business must be apparent, if we look through the "device" of a mere "measure." This result is as clear as though the statute had *in terms* provided that "the amount of the tax shall be *measured* by increases in interstate commerce and the capital represented thereby."

The *real* intent of the statute, as enacted, cannot be obscured by the *presumed* intent afterwards ascribed to the legislature to pass a constitutional statute, by judicial legislation at successive stages, eliminating from its operation corporations transacting interstate business exclusively and those carrying on transportation for hire, where interstate business is "inextricably interwoven" with domestic traffic.

*Atty. Genl. v. Electric Storage Battery Co.*, 188 Mass. 239.

*Baltic Mining Co. v. Commonwealth*, 207 Mass. 381.

*S. S. White etc. Co. v. Commonwealth*, 212 Mass. 35.

This kind of excise taxation measured by capital was originally adopted in Massachusetts some fifty years ago,

when the limitations of the "commerce" clause were little understood.

2. The mere use of a "measure," in the determination of a foreign corporation excise, by taking into account increases in interstate business and capital, is persuasive evidence of an intent to cover up the *real* effect of the tax. Of course, this is not the case with wholly different kinds of *measure*, where "gross income," "gross receipts" or the like are resorted to merely as a *measure* of the *size* of a corporation, as in the Federal Corporation Excise law, where some measure must necessarily be resorted to.

In foreign corporation excises, many reasonable and proper *measures* can readily be suggested, like the Massachusetts measure of proportional lines or business carried on within the State as applied to railroads, telegraph, telephone and express companies, or where *fixed* taxes are imposed <sup>see</sup> ~~on~~ <sup>plant</sup> on corporations which are graduated according to their *size*, as determined and measured by capital stock.

3. The Massachusetts system of taxing *authorized* capital stock, instead of *issued* capital, aside from its wholly *unreasonable basis*, necessarily results in measuring the tax by, and thus burdening something which is either non-existent or with which Massachusetts has absolutely no concern.

Here the *International Paper* company is taxed on more than \$5,000,000 of *unissued* capital. The adoption of such a basis manifests an intent to tax something wholly unconnected with the privilege of transacting business in Massachusetts or the value of the local privilege.

It thus indicates an intent to resort to a measure which taxes and burdens either interstate business or the franchise ~~if issued~~ <sup>if issued</sup> ~~by~~ further capital granted by the State where the company is incorporated. In other words, the burden of payment of a tax based, in part, on *unissued* capital actually falls on something wholly distinct from domestic

business, the receipts therefrom or the value of the local privilege.

4. The *actual* effect of the tax, as applied by the Court below, is to tax the corporation for the *potential use* of the local privilege, wholly irrespective of the amount of its *actual exercise*, whether much or little, substantial or technical and trivial, or valuable or worthless. Wholly apart from the *unreasonable basis* of the tax, as thus applied, it is made apparent in our *Cheney* brief that, in some cases, there is no local revenue-producing business whatsoever (*Champion* and *Cheney* cases); and, in other cases, a very slight amount (*Lanston* and *Northwestern* cases). In all such cases, which are not unusual, the ordinary and actual effect of the tax is to burden the interstate business and revenues derived therefrom, for they are the only source from which the tax can be paid. The State must be presumed to have *intended* the natural and ordinary effect of the tax, in all such cases.

5. To limit the protection of the "commerce" clause to "indispensable" and "inseparable" incidents to interstate commerce, clearly manifests the intent to reach and burden such commerce, by taxing its ordinary incidents and instrumentalities, which are not to be classed as "indispensable."

6. The refusal of the Court below to rule that the tax must bear some fair and reasonable relation to the value of the local privilege, and the fact that it is "unduly great" and "disproportioned" to such value, in many cases, as shown in our *Cheney* brief, indicate clearly that the Massachusetts statutes constitute a mere "device" to reach interstate business and revenues.

7. The removal of the limitation of \$2,000 in 1914 furnishes a fair indication of the intent of the legislature to tax interstate business and capital as much as the traffic will bear. Immediately after the *Baltic* decision the legislature apparently thought that all restraints were removed,

and that any amount could be exacted from foreign corporations, so long as it preserved the *form* of a *measure*. It, accordingly, removed all limits and increased the taxes on the largest corporations from \$2,000 to more than \$10,000 in many cases. The amount of local business remained the same. The value of the privilege had not risen. The fair deduction seems to be that the real purpose of this amendment was to burden interstate business and revenues as heavily as the traffic could bear, and that it was not in the nature of a tardy recognition that the local privilege was of far greater value than had previously been supposed. We submit, in view of the above reasons, that the real "purpose" of the Massachusetts legislation is to reach and burden interstate business, as represented, in part, by the total authorized capital.

That this is its "necessary operation and effect" was conclusively determined by the *Western Union* decisions (216 U. S. 1, 56) as to the identical Kansas statute, and this is the final test of its constitutional validity, even if we have failed in making clear its real substance and "purpose," irrespective of its form.

## II.

THE MASSACHUSETTS EXCISE IS UNCONSTITUTIONAL AND VOID, BECAUSE IT <sup>violates</sup> ~~INVOLVES~~ THE "EQUAL PROTECTION OF THE LAWS" CLAUSE, UNDER THE DOCTRINE OF *SOUTHERN RAILWAY CO. v. GREENE* (216 U. S. 400).

The *International Paper* case presents the clearest facts, among the cases now argued, bringing it within the direct authority of *Southern Railway Co. v. Greene* (216 U. S. 400). The only escape is to hold that the principles of that case apply only to railroad companies, and nothing in the opinion warrants this limited application. Nor can any sound reason be adduced to show why the just and sound con-

clusions of that case should not apply generally to all classes of foreign corporations which have made an investment in "permanent property" within the State, under or upon the faith of the existing system of taxation, have paid license fees for admission to the State, excise fees under the existing system, and property taxes, and now find themselves called upon to pay additional onerous excises, whereas domestic corporations transacting a precisely similar business are not subjected to any changes in taxation. Under the facts of this case it is impossible to argue that there was no "permanent" property investment made by the *International Paper* company under the pre-existing tax system.

The later statutes did not merely increase the *rate* of taxation. They imposed *additional* and much more onerous system<sup>f</sup> of taxation. Indeed, it is claimed by the Commonwealth that the 1914 statute imposes an excise which is strictly *additional* to the excise imposed upon the same corporation by the 1909 statute, and is separable therefrom, upon the question of constitutionality. For our arguments as to the meaning and effect of the *Greene* decision we refer to our *Cheney* brief. But the facts here are still stronger than those in the *White* case there argued.

**Facts bringing the INTERNATIONAL PAPER Case directly within the Authority of Southern Ry. Co. v. Greene (216 U. S. 400).**

The International Paper company, as a foreign corporation, was duly admitted to transact business in Massachusetts.

It paid the regular license fee of \$25, paid by all foreign corporations upon their admission to the State. Before 1903 it had made a large investment in the State in "permanent" property. Between 1903 and 1907 it made additions and improvements costing \$26,000, and paid full property taxes to the town of Montague. For the year in

question its local property taxes amounted to \$8,118. Under the tax system of 1903 it was assessable for an excise tax at the maximum of \$2,000, but was allowed to deduct therefrom its local property taxes, so that no excise whatsoever was payable by it. Under the amendment of 1907 its right to deduct local property taxes was repealed, so that it then was obliged to pay the maximum excise tax of \$2,000. Under the amendment of 1914, its excise tax was increased to \$5,500. Except for the repeal of the right to deduct property taxes, it would now be liable for no excise tax whatsoever.

The International Paper Company owns a paper mill in this State which is taxed locally for \$472,000.

It had made this "permanent" investment before the change of the excise law in 1907, under the tax systems which had prevailed prior thereto.

Twenty-six thousand dollars' worth of "permanent" improvements to this plant were made between 1903 and 1907.

A paper mill "requires for its operation a plant, water-power, buildings and special machinery and appliances of special nature and construction."

„A very important part of the required investment consists of water-power, sluiceways, machinery and appliances of special construction (including such additions and improvements as were made between 1903 and 1907, as aforesaid) much of which is of no use in kinds of business other than paper manufacturing.“

Regarding the permanent improvements made between 1903 and 1907, the agreed facts state that "such additions and improvements consisted mainly of a fire sprinkler system, a new water wheel for a pulp mill, additional equipment for a new boiler house, a time office and a power and light plant. No part of such additions and improvements could be abandoned, removed or converted to or sold for uses other than those of a paper mill, except at a substantial

loss to the petitioner in their present market value for the purposes for which they are now using them."

In case of the abandonment of the whole plant, or the removal of its domestic business to some other State, certain results can be figured on with a fair degree of certainty, without regard to the conclusions stated in the agreed facts.

It is obvious that its land might be devoted to other ordinary real estate uses.

So also could the land occupied by a railroad station or for a railroad right of way. It has often been the case that railroad lands have been sold at a large profit above their original cost.

Water-power and buildings might also, to some extent, be utilized for other purposes, but ordinarily such change of use would involve large expenditures and a considerable loss on the original investment.

But it is perfectly clear that a large loss must inevitably result from the abandonment of the special machinery and appliances used in a paper mill, a considerable part of which could not be moved from its present location or would become practically useless, particularly those important and valuable parts of the machinery and appliances which are used in the process of manufacturing the fiber and materials up to the point at which the fiber is put on the paper machines. The loss which ordinarily and necessarily would follow the abandonment of any kind of a manufacturing plant, with special machinery and appliances, might fairly be assumed to be a matter of common knowledge, and not to require any special proof.

But the agreed facts state clearly the result of abandonment, in the case of paper mills. The agreed facts show distinctly what is sufficiently apparent without evidence, that water-powers, sluiceways and special machinery used in paper manufacturing are not readily salable at reasonable prices. They cannot readily be sold to other paper manu-

facturing companies or to persons who wish to devote them to other valuable uses.

The agreed facts state that, "if the petitioner abandoned its business of manufacturing paper in Massachusetts, its plant would be worth its present fair market value as a paper manufacturing plant if it could be sold in its entirety for paper manufacturing purposes. . . . If, however, it was unable to obtain a purchaser who desired to operate the plant for manufacturing paper, it is probable that the petitioner would be able to sell this plant, or the improvements and additions made between 1903 and 1907 as aforesaid, only at a *substantial loss* from their present fair market value as a paper manufacturing plant, or as parts of such a plant."

We submit that this manufacturing plant is a "permanent property" investment, within the meaning of the *Greene* decision.

Under the Act of 1903 (c. 437, § 75), the foreign corporation excise amounted to one one-hundredth of one per cent, but the company was allowed to deduct the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year.

In 1907 (Sts. 1907, c. 578; now Sts. 1909, c. 490, Part III, Sec. 56), the rate of taxation was doubled as to the smaller companies, having a capital up to \$10,000,000.

By the same statute the previously existing right to deduct local property taxes was abolished as to foreign corporations, but retained as to domestic corporations, which still have this right (St. 1903, c. 437, Secs. 71, 75; St. 1909, c. 490, Part III, Secs. 41, 43).

The discriminatory method of taxation against foreign corporations under the above statutes of 1907 and 1909, as amended by St. 1914, c. 724, consists:

(1) In doubling the amount of the excise previously in force under the Statute of 1903, as applied to the smaller corporations.

(2) In repealing the right previously enjoyed by foreign

corporations to deduct from their excises the amount of local property taxes.

(3) In making no similar changes increasing the tax burdens of domestic corporations engaged in precisely the same business.

(4) In making the tax unlimited by the amendment of 1914. The practical result to the *International Paper Company* is that it is obliged to pay an excise of \$5,500, whereas, if it deducted its property taxes, amounting to \$8,100, it would be liable to no excise taxation whatever.

### III.

#### "EQUAL PROTECTION" CLAUSE, AS APPLIED TO THE DISCRIMINATION AGAINST THE SMALLER CORPORATIONS.

The Locomobile company claims that by the amended statute, as well as the original statute, it was unlawfully discriminated against (See 9th Request, Locomobile case).

This excise denies "equal protection of the laws" to the smaller corporations by discriminating against them in favor of the larger and richer corporations, which are much more able to bear the burdens of taxation.

The amended statute arbitrarily draws the line at \$10,000,000.

Any other figure might have been chosen with equal reason, or lack of reason. Above that figure the larger corporations pay only one-half the rate assessed against the smaller ones.

It is settled, under the "equal protection" clause, that, while "reasonable classification" is permissible, for purposes of excise taxation, all within the same class, and subject to like conditions, must be treated alike.

*Chicago Dock Co. v. Fraley*, 228 U. S. 680, 687.

Here, all foreign corporations are not treated alike.

They must be, unless some *reasonable* basis can be suggested for a classification into foreign corporations above and below \$10,000,000.

No tangible reason can be suggested for such a classification, except the real, but unlawful, reason that, under this statute, it was intended to favor the larger and richer corporations.

Palpably arbitrary classification renders a statute unconstitutional.

Classification no more arbitrary than that adopted in the Massachusetts excise has been condemned as palpably arbitrary, and thus denying "equal protection of the laws," in a number of cases.

*Gulf, Colorado & Santa Fé Ry. v. Ellis*, 165 U. S. 150.

*Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79.

*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540.

*Southern Ry. Co. v. Greene*, 216 U. S. 400.

*Smith v. Texas*, 233 U. S. 630.

Gradated inheritance and income tax cases do not militate against our position, for they rest upon the principle that those more able to pay should reasonably be called upon to bear heavier burdens of taxation than those less wealthy, and that the poorer classes may even be wholly exempted.

The Massachusetts tax adopts the reverse principle.

The richer pay a smaller tax, one-half of the rate applied to the smaller and poorer companies.

A classification based solely on mere size or wealth is purely arbitrary and capricious, resting upon no reasonable basis, where the law taxes the poor and exempts the rich from one-half of the tax burden. It, therefore, offends against "equal protection," and is unconstitutional and void.

The same may be said as to the original statute, making all foreign corporations, having a capitalization above \$10,000,000, pay exactly the same tax. The International Paper Company is discriminated against, under the \$2,000 tax, because a \$100,000,000 company pays no higher tax than a \$<sup>75</sup>1,000,000 or a \$10,000,000 company (see 10th Request, *International* case).

The opinion of the Court below seems to have overlooked the contention of the *Locomobile* company under the "equal protection" clause. But the question is distinctly raised in the Record (9th Request, *Locomobile* case).

We submit that the *International Paper* excise comes directly within the authority of the *Greene* case, and is unconstitutional under the "equal protection" clause, because it is an *additional* excise, which discriminates against foreign corporations in favor of domestic corporations of the same kind, which have had no *additional* burdens imposed on them at the same time or since, and because this company had made a "permanent property" investment of large amount under and upon the faith of the pre-existing tax system of 1903.

### **The Attempt to Compare the Tax Burdens on Foreign and Domestic Corporations is Not Open to the Commonwealth, upon This Record.**

In our *Cheney* brief, we have pointed out that the Commonwealth is not justified in its claim that foreign corporations were taxed more lightly than domestic corporations prior to 1907, and that the changes were then made for the purpose of remedying the inequality.

We here insist that no such claim is open to argument on the Record.

Only the requests for rulings presented by the plaintiff in error are before the Court. The Commonwealth asked for no ruling to this effect.

No such claim was passed upon by the Court below. No sufficient data appear in the Record to enable a proper comparison to be made.

#### IV.

THE CLAIM OF THE COMMONWEALTH THAT THE ORIGINAL AND AMENDED STATUTES ARE SEPARABLE AND THAT THE AMENDMENT OF 1914 MAY BE DECLARED UNCONSTITUTIONAL, WITHOUT AFFECTING THE CONSTITUTIONALITY OF THE ORIGINAL STATUTE, IS NOT OPEN TO IT, UPON THE RECORD, BECAUSE NO SUCH QUESTION WAS PASSED UPON BY THE COURT BELOW.

Only the requests for rulings presented by the plaintiffs in error and refused are covered by the Bill of Exceptions. The Commonwealth presented no requests. The claim of the Commonwealth that the portion<sup>s</sup> of the excises enacted respectively under the original statute and the amendment of 1914 are separable, and that the excise may be void, in part, under the amendment, and valid, in part, under the original statute, is not now open to it.

Such a claim is not covered by the Record. Nor was it passed upon by the Court below. In any event, the statutes constituted a single-tax system, and the *Locomobile* company, although not taxed additionally by the statute of 1914, is entitled to a determination as to the constitutional invalidity ~~of~~<sup>is</sup> a "fluctuating" tax system of this character, which is freed from all limitations as to amount.

We submit that the decree<sup>s</sup> should be ~~reversed~~<sup>set aside</sup>, and decrees should be ordered to be entered in favor of the plaintiffs in error for the recovery of the taxes sued for with interest and costs.

CHARLES A. SNOW,  
FRANK T. BENNER,  
WILLIAM P. EVERTS,

*Counsel for Plaintiffs in Error.*



34

Office Supreme Court, U. S.

FILED

OCT 8 1917

JAMES D. MAHER

CLERK

---

---

**Supreme Court of the United States**

OCTOBER TERM, 1917

No. **734**

THE LOCOMOBILE COMPANY OF AMERICA

v.

THE COMMONWEALTH OF MASSACHUSETTS

---

In Error to the Supreme Judicial Court of Massachusetts

---

**BRIEF FOR DEFENDANT IN ERROR**

---

**HENRY C. ATTWILL**

*Attorney-General for the Commonwealth of Massachusetts*

**WM. HAROLD HITCHCOCK**

*Assistant Attorney-General*

---

---



# Supreme Court of the United States

OCTOBER TERM, 1917

No.

---

THE LOCOMOBILE COMPANY OF AMERICA

v.

THE COMMONWEALTH OF MASSACHUSETTS

---

In Error to the Supreme Judicial Court of Massachusetts

---

**BRIEF FOR DEFENDANT IN ERROR**

---

HENRY C. ATTWILL

*Attorney-General for the Commonwealth of Massachusetts*

WM. HAROLD HITCHCOCK

*Assistant Attorney-General*



# Supreme Court of the United States,

October Term, 1917.

No. \_\_\_\_\_

THE LOCOMOBILE COMPANY OF AMERICA,

*v.*

THE COMMONWEALTH OF MASSACHUSETTS.

\_\_\_\_\_  
IN ERROR TO THE SUPREME JUDICIAL COURT OF  
MASSACHUSETTS.

\_\_\_\_\_  
*BRIEF FOR DEFENDANT IN ERROR.*

## \_\_\_\_\_ STATEMENT OF CASE.

This is a writ of error, brought to reverse a decree entered by the Supreme Judicial Court of Massachusetts on September 25, 1917, dismissing a petition to recover the amount of a foreign corporation excise tax assessed upon the petitioner and paid by it to the Commonwealth of Massachusetts on May 15, 1915. This case was argued and decided in the State court together with the case of *International Paper Company v. Commonwealth* also pending in this court on a writ of error and will be argued here together with that case. The tax in question is claimed to be

invalid upon the same grounds that the tax is attacked in the latter case. The plaintiff in error will be referred to in this brief as the petitioner.

A petition involving the validity of a similar tax assessed upon the petitioner in 1913 is pending before this court on writ of error as one of the cases involved in No. 12, Cheney Brothers Company *et al.* v. the Commonwealth. A motion is to be made to advance this case for argument together with that case.

The facts set forth in this record are precisely the same as those set forth concerning the business of the petitioner in No. 12, except that the authorized capital stock of the petitioner has now been increased from \$5,000,000 to \$6,500,000, and that its local repair business has substantially increased since 1913, the stock of repair parts now kept on hand amounting to \$16,000 on the average and the repairs made at the Boston place of business amounting to \$27,000 annually. Of the authorized increase of capital stock above stated \$1,250,000 has been paid in. This additional capital was used solely to extend and improve the company's manufacturing plant in Bridgeport, Connecticut, and to increase its business of manufacturing and selling automobiles to be delivered from that plant.

#### STATUTES.

The provisions of all the statutes of Massachusetts which it is conceived can have any bearing upon this case or the other cases above referred to are set forth in full in the original brief of the Commonwealth in No. 12, Cheney Brothers Company *et al.* v. Commonwealth,

and in its brief in *International Paper Company v. Commonwealth*. For convenience of reference the two sections most directly connected with this case are stated here.

*St. 1909, c. 490, pt. III. § 56.*

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

*St. 1914, c. 724, § 1.*

"SECTION 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

## ARGUMENT.

### I.

THE PETITIONER IS TAXABLE UNDER THE ORIGINAL STATUTE. (St. 1909, c. 490, Pt. III., § 56.)

The nature of the business done by the petitioner in Massachusetts was precisely the same at the time of the assessment of the tax now in question as during

the period for which the tax of 1913, attacked in No. 12, was assessed. Its sale of new cars was conducted in precisely the same manner. It still maintained a department for the sale of second-hand cars, and in that department did business of the same extent as in 1913. The business of its local repair department had substantially increased, so that it now maintained a stock of repair parts of the value of \$16,000 as compared with \$6,000 in 1913, and it did business in that department amounting to \$27,000 annually as compared with \$7,500 in 1913.

In the original and supplementary briefs of the Commonwealth in No. 12, it is demonstrated that this corporation is in Massachusetts "carrying on a purely local and domestic business quite separate from its interstate transactions", and that this local and domestic business "is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business" of the petitioner. *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 86. It follows upon the authority of the last cited case that it was within the power of the Commonwealth to impose the tax in question upon this petitioner for the privilege of doing that local business in Massachusetts.

In the case at bar there is even less ground for attacking the validity of this tax than in the petitioner's case before this court in No. 12. Though its tax has now increased from \$1,000 to \$1,300, the business of its local repair department alone has increased from \$7,500 to \$27,000, an increase of over 250 per cent. Nothing appears as to the extent of the profit made in this department, but it is obvious that such profit

must be substantial and many times greater than the tax imposed.

The fact that this corporation has now increased its authorized and paid in capital and invested that increase entirely in its Connecticut plant and in developing its business of selling new cars has no material bearing upon the validity of the tax in question. The only effect of this increase was to increase the tax of the petitioner to the extent of \$300. In the Baltic Mining Company case it was expressly held, with reference to a tax under precisely the same statute, "that the authorized capital is used only as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce." (p. 87.) The taxes involved in that case were sustained entirely without reference to the extent to which the authorized capital was invested within the Commonwealth. By its decision in that case this court in effect held that the authorized capital of a foreign corporation was a valid measure of taxes imposed upon such foreign corporations under the Massachusetts law up to the full amount of the \$2,000 limitation contained in this statute. For the reasons stated by this court in the Baltic Mining Company case, the increased authorized capital of the petitioner was plainly a legitimate measure of its taxation for the privilege of conducting its local business in Massachusetts.

It is obvious, however, that even though none of this additional capital was invested in Massachusetts that increase was reflected in the increased local business. There is unquestionably a direct connection between the additional investment by this company of \$1,250,000 in its Bridgeport plant and in its busi-

ness of selling new cars, and the large increase in its local repair business in Massachusetts. The increase in the sale of new cars naturally brought a corresponding increase in the business of repairing cars which had been sold in Massachusetts. Thus this case plainly indicates the reasonableness of adopting authorized capital as a measure of taxation of this character.

## II.

THE NEW STATUTE (St. 1914, c. 724) HAS NO BEARING UPON THE RIGHTS OF THIS PETITIONER.

St. 1914, c. 724, does not purport to be, and in fact is not, an amendment of the statute under which this petitioner is taxed. (St. 1909, c. 490, pt. III, § 56.) It merely refers to that section to indicate the corporations to which it applies. It then imposes an excise tax in addition to the tax already imposed by section 56 upon all corporations included within the scope of the latter section whose authorized capital is in excess of \$10,000,000.

Thus this new statute merely imposes an additional tax on certain foreign corporations. It makes no change whatever in the character of the tax imposed by the original statute, in the rate of that tax, or in the corporations which are subject to it. It leaves the whole system of foreign corporation excise taxes unchanged except for this additional tax imposed on large corporations whose capital is above a certain amount. Though it in practical effect removes the \$2,000 limit provided by section 56, it in no way affects any corporation until its authorized capital

exceeds an amount which would produce that limit, namely, \$10,000,000.

If for any reason this new statute is unconstitutional as a whole, or if, by reason of particular circumstances in individual cases, any tax imposed under it upon any corporation subject to its terms is void, the system of taxation established by section 56 remains unaffected. Therefore the additional tax imposed by this statute is plainly separable from the tax imposed under section 56, and a decision that any tax under the statute of 1914 is invalid cannot affect taxes assessed upon any corporation whose authorized capital stock does not exceed \$10,000,000. This in substance is the ruling of the Supreme Judicial Court of Massachusetts in the case at bar. The ruling of that court that these two statutes are entirely separable will, of course, be followed here as purely a matter of statutory construction.

As this petitioner is in no wise affected by the enactment of the statute of 1914, it cannot be heard to question the validity of that statute or of taxes imposed under it upon corporations coming within its terms.

*Hatch v. Reardon*, 204 U. S. 152, 160.

*Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576.

*Louisville & Nashville R.R. v. Finn*, 235 U. S. 601, 610.

*Rail & River Coal Co. v. Ohio Industrial Commission*, 236 U. S. 338, 349.

Obviously there is no discrimination against this petitioner in the imposing of a tax, in addition to that paid by it, upon corporations having a larger authorized

capital. The larger corporation is subject to a tax measured at precisely the same rate as the petitioner upon its authorized capital up to \$10,000,000, an amount largely exceeding the capital of the petitioner, and then is subjected to an additional tax measured at a lower rate. All corporations, great and small, are subject to the same measure of taxation until their authorized capital exceeds \$10,000,000; then an additional tax is imposed upon large corporations. If there is any discrimination in such a method of taxation it is in favor of this petitioner and not against it.

### III.

#### CONCLUSION.

For the foregoing reasons and also for the reasons set forth in the briefs of the Commonwealth in the case of the petitioner involved in No. 12, Cheney Brothers Company *et al. v. Commonwealth*, the Commonwealth contends that the decree of the Supreme Judicial Court should be affirmed.

Respectfully submitted,

HENRY C. ATTWILL,

*Attorney-General for the Commonwealth  
of Massachusetts.*

WM. HAROLD HITCHCOCK,

*Assistant Attorney-General.*

